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85-1742

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Julian W. Rawl, Administrator of the
Estate of Edwin E. Rawl, Jr.,
Petitioner,

v.

United States of America.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Certiorari should be granted to review the Fourth Circuit's practice of circumventing the protections afforded the findings of fact of a trial court under Rule 52(a), Federal Rules of Civil Procedure, by characterizing its de novo findings of fact as corrections of the District Court's error of law.

2. Certiorari should be granted to resolve a conflict in the circuits and within the Fourth Circuit regarding whether Rule 52(a), Federal Rules of civil procedure, forbids appellate review of trial court findings of negligence as findings of fact.

PARTIES

The parties to this proceeding are Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr., and the United States of America.

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PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
FOURTH CIRCUIT

Petitioner Julian W. Rawl respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 4, 1985.

OPINIONS BELOW

The decision of the court of appeals is reported at 778 F. 2d 1009 (4th Cir. 1985) and is set out at pp. 39-57 of the Appendix to the Petition. The order denying rehearing and suggestion for rehearing en banc, which is not reported, was filed on January 21, 1986, and is set out at p. 58 of the Appendix. The District Court's Findings of Fact, Conclusions of Law and Order, which are not reported, are set out at pp. of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1985. A timely Petition for Rehearing was filed, which was denied on January 21, 1986. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254.

RULE INVOLVED

Rule 52 (a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusion of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which consitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses....

STATEMENT OF THE CASE

On December 23, 1980, Petitioner commenced this action in the United States District Court for the District of South Carolina, Charleston Division. The action

was brought under the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq. The claim arose out of an airplane crash which occurred on February 17, 1978, near the Grand Strand airport at Myrtle Beach, South Carolina, which took the lives of Edwin E. Rawl, Jr., and his wife, Josie W. Rawl. Petitioner is administrator of the estate of Edwin E. Rawl, Jr.

Petitioner's complaint alleged that the defendant's, U.S.A.'s, agents and employees, acting within the course and scope of their employment with the defendant, and in particular one air traffic controller, violated certain Federal Aviation Administration ("FAA") regulations and procedures, and committed other acts of negligence which led to the crash.

The case was heard at a non-jury trial on August 31 and September 1 and 2, 1983. Oral

arguments were made by the parties on January 17, 1984. The testimony was extensive, including that from air traffic control experts, a pilot expert and submission of countless pages of transcripts from radio transmissions culminating in the crash of Edwin E. Rawl, Jr.

The facts in this matter are far from simple. On the afternoon of February 17, 1978, petitioner's intestate, Mr. Rawl, left the Grand Strand Airport at Myrtle Beach, South Carolina at approximately 5:45 p.m., with a planned destination of Greenville, North Carolina, a distance in flying time of approximately one hour. He was flying an airplane which he owned, a 1977 Beechcraft Bonanza, bearing FAA registration number N17523. Mr. Rawl was certified by the FAA to fly airplanes under visual flight rules ("VFR"). Visual flight rules means a pilot flies by

sight. It is authorized and quite normal for a "VFR" pilot to fly either during the daytime or nighttime, See 14 C.F.R. Section 91-105 (1983). The FAA provides another certification, instrument flight rules or "IFR" which means a pilot must be able to fly relying on his or her instruments alone. See 14 C.F.R Section 91.115-.129 (1983). Mr. Rawl was not certified as an IFR pilot.

On numerous occasions during the day on February 17, Mr. Rawl contacted Myrtle Beach Flight Service Station for weather information. His last contact with Flight Service was at 5:34 p.m. approximately eleven minutes prior to his flight from Myrtle Beach to Greenville. Those forecasts indicated VFR flight conditions were present with hazy visibility and a forecast for deterioration of those conditions towards the middle

of the evening. In fact, the weather report disseminated by Flight Service failed to be accurate as the weather conditions deteriorated more rapidly than forecast, so that visibility at the Grand Strand Airport was less than two miles at the time Mr. Rawl left the airport with fog and haze present. There was a broken layer of clouds at 500 feet and the same at 3000 feet. On his take off, Mr. Rawl broke out of the scattered clouds at approximately 800 feet and remarked that he had been able to see all the way through it.

Mr. Rawl arrived at the Greenville, North Carolina airport a short time later and picked up his wife. Twenty minutes later he took off again, heading towards Myrtle Beach. Mr. Rawl was returning with Mrs. Rawl as they were to be guests at a dinner that evening around 8:00 p.m.

During the period after Mr. Rawl left Myrtle Beach to the time he returned to the Myrtle Beach vicinity, the weather had deteriorated extensively with unusual rapidity. The forecasts of the Flight Service simply failed to predict or adequately depict this rapidly changing weather condition. An unusually thick fog settled in the area. The plaintiff himself, Mr. Rawl's son, upon exiting a restaurant where he had just eaten dinner, became concerned about the change and proceeded to promptly call both Radar Approach Control ("RAPCON") and Myrtle Beach Approach Control[1] to plead with them to tell his father of the

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[1]The approach control tower and the radar approach control ("RAPCON") were under the control of and operated by the Air Force at the time of these events. The FAA had delegated authority to control civilian planes flying into the Grand Strand Airport to the Air Force.

change in weather conditions and communicate to Mr. Rawl that he needed to divert to Wilmington, North Carolina where the weather was clearer and plaintiff would have a car waiting to transport Mr. and Mrs. Rawl back to Myrtle Beach. Five such calls were made to RAPCON and one to Approach Control. While it is uncertain when the calls were made, it is known at least two calls were made prior to the crash. No such warning or message was delivered to Mr. Rawl.

Mr. Rawl first made contact with the Myrtle Beach Approach Control at or about 7:19:40 p.m.[2]

At Approximately a minute later at 7:20:52 p.m., Mr. Rawl informed the RAPCON that he was flying under visual flight rules or

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[2]All references to time in the petition are given in Eastern Standard Time--hours, minutes and, in instances where available, seconds.

VFR. In preparation for entering the control zone[3], Mr. Rawl became classified as special VFR.[4] About seven minutes later at 7:29:23 p.m., Mr. Rawl reported that he was flying in VFR conditions as he approached the Grand Strand Airport.

At approximately 7:28:30 p.m. and again at approximately 7:42:57 p.m., Mr. Rawl was told to stay clear of the control zone and to expect a ten minute delay.

While Mr. Rawl was in a

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[3]A control zone is "a circular area with a radius of 5 miles and any extensions necessary to include instrument approach and departure parts." 14 CFR Section 71.11 (1983).

[4]The special VFR weather minimums are found at 14 CFR Section 91.107 (1983). Visibility must be at least one statute mile, and the special minimums under this section are inapplicable between sunset and sunrise. In essence, the special VFR allows a pilot to fly within controlled airspace as long as there is at least one mile of visibility and the pilot stays clear of clouds. Further, a special VFR only applies to flight within the control zone.

holding pattern, the RAPCON was attempting to bring Cessna 46309 into the airport. Like Mr. Rawl, the pilot of Cessna 46309 was flying with special VFR clearance. That pilot made several passes over the Grand Strand Airport but was unable to see it. At approximately 7:50:18 p.m. the flight data position at the Grand Strand Airport tower declared Cessna 46309 to be involved in an emergency situation. At approximately 7:50:18 p.m., Cessna 46309 landed, but ended up off the airfield in the grass. For a period of time, while Cessna 46309 was in the air until the aircraft was rediscovered in the grass, radio contact with Cessna was nonexistent. From peals of laughter heard from the microphone at the flight data position within the control tower, the comment was made, "tell Cessna if he can't fly it, fuck him." The

RAPCON was aware of the difficulty the Cessna had in attempting to land and that the attempt to get it down safely had been labeled an emergency. There was no evidence Mr. Rawl realized the difficulty of Cessna 46309.[5] Apparently, believing the landing was uneventful, Mr. Rawl requested RAPCON to inform him of the altitude Cessna had broken through the cloud cover.

At approximately 8:00 p.m., Mr. Rawl was cleared to approach the Grand Strand control zone from the northeast. He was told to maintain special VFR conditions at or below 1500 feet. He was approximately seven miles from the airport at this time.

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[5]In its opinion and without citation in the record, the Court of Appeals disregards the District Court's finding that Mr. Rawl was unaware of the difficulties of Cessna 46309 and makes its independent finding that Mr. Rawl was aware of Cessna's problems.

At approximately 8:03:16 p.m., RAPCON suggested that another small aircraft, Baron 9669 Yankee divert to Wilmington, North Carolina where the weather was better than Myrtle Beach at three mile visibility with fog and haze. 9669 Yankee did not land at Myrtle Beach following this suggestion. A similar suggestion was not made to Mr. Rawl nor did Mr. Rawl hear the suggestion given to 9669 Yankee because he was on a different radio frequency at that time.

The next communication with Mr. Rawl was at approximately 8:04 p.m. He informed RAPCON that he had approximately four hours of fuel left. He was still flying at 2500 feet and indicated he believed he would be unable to see the airport at that altitude. At or about 8:04:51 p.m., Mr. Rawl asked

for vectors[6] to the airport believing he could "slip right down under it." At this time, Mr. Rawl maintained an altitude of 2500 feet. It further appears he was flying between layers of clouds at 1000 feet and 3000 feet. VFR conditions were present though it is not clear what the actual conditions of the clouds were between the cloud layers.[7] It further appears that while VFR

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[6]Vector used as a verb, means to guide in flight by means of radioed vector. WEBSTERS THIRD INTERNATIONAL DICTIONARY 2537 (1976). A radar vector is a specific heading derived from a radar and given to a pilot.

[7]The air traffic control manual requires that controllers become familiar and stay aware of pertinent weather information. The manual further requires that controllers solicit pilot weather reports (PIREPS) from aircraft when ceilings are at or below 5000 feet and visibility is at or less than five miles. PIREPS were not obtained by airman Hennessey on this evening later than 7:00 p.m. See Air Traffic Control Manual Chapter 2, Section 40; Chapter 3, Section 18, paragraph .521; Chapter 2, Section 2, paragraph 4.

conditions existed between the clouds, the outside visual references were obscured or severely limited by the clouds, the Atlantic Ocean to the East, and unpopulated areas to the West. It is important that Mr. Rawl experienced no difficulty flying under these circumstances and had done so for approximately thirty minutes.

During Mr. Rawl's exchange with RAPCON, which began at 8:04, he was told to descend and maintain 1600 feet.

At or about 8:05:17 p.m., Mr. Rawl was outside the control zone flying in a generally northeast direction which would be a heading of 045. At 8:05:17 p.m., Mr. Rawl was told by RAPCON to turn left to a heading of 270. This is a left turn of 135°.

Following this instruction, at or about 8:06:36 p.m., Mr. Rawl was

asked to state his heading. He responded that he was at "300", which meant that he had completed 105° of the previous command to turn left 135° to a 270° heading.

Though Mr. Rawl advised that he was at 300, a portion of that communication was inaudible so that all Airman Hennessey heard was 30.[8] Rather than asking Mr. Rawl to clarify his answer, Hennessey incorrectly assumed that the heading given was 030 and, based upon that false assumption, told Mr. Rawl to turn right to 120, a turn of 180°.

Someone in the control tower overheard the conversation between Hennessey and Mr. Rawl at about 8:06:36, and told Hennessey he thought he, Hennessey, had misunderstood Mr. Rawl. Hennessey then asked Mr. Rawl for clarification,

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[8]The correct manner which "30" would be communicated would be 030.

which he received at 8:06:53 p.m. Mr. Rawl, at that time, advised that his 8:06:36 p.m. response had been 300 and proceeded to give his then current heading of 330. Hennessey then told Mr. Rawl to turn left to a heading of 220, a turn of 110 degrees. It is unknown exactly what his heading was before he went into a dive, however, it appears obvious he was unable to complete this final turn. In terms of degrees, Hennessey, in the space of one minute and thirty-six seconds, instructed Mr. Rawl to turn left 135 degrees, then back right, 180 degrees, then back left 110 degrees.

Mr. Rawl's final transmission occurred at approximately 8:07 p.m. During this transmission, the audio level dropped as if his microphone was being pulled away from his mouth.

Shortly following this last

transmission, the RAPCON radar screen showed Mr. Rawl's plane descending from 2500 feet to about 1600 feet in a space of five seconds. Within five seconds more the plane had disappeared.

During these last moments of his father's flight, plaintiff continued to call the airport and request his father be diverted to Wilmington, North Carolina. On his last call, in response to his question whether his father was still airborne, the line went dead.

It is uncontroverted that the crash resulted from Mr. Rawl's developing spatial disorientation brought on by the series of turns directed by Hennessey.

Spatial disorientation is a condition which results from a conflict between one's visual clues and inner feelings. When a pilot is deprived of normal visual clues, false sensations may envelop him or

her and he or she quite simply may not be able to tell which end is up. For example, he or she may have the sensation of climbing when the plane is actually descending. This condition may occur while a pilot is in straight flight if there are uneven light sources, a slanting, uneven cloud bank or sunlight through haze hitting a propeller. It may also be induced by putting the plane through turns or by head movements by the pilot. Mr. Rawl developed spatial disorientation because he was deprived of outside visual references and was directed to execute several sharp turns within a very short period of time. Hennessey had been briefed on spatial disorientation during his training and knew that one of the duties of a controller was to avoid inducing spatial disorientation in pilots. He also knew one

of the activities he should guard against was directing the pilot to make excessive turns, that is one turn right after another turn after another.

Section 1592 of the Air Traffic Control Manual[9] entitled "Radar Assistance Techniques" reiterates this concern and provides as follows:

> Use the following techniques to the extent possible when you provide radar assistance to a pilot not qualified to operate in IFR conditions:
>
> a. Avoid radio frequency changes except when necessary to provide a clear communications channel.
>
> b. Make turns while the aircraft is in VFR conditions so it will be in a position to fly a

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[9]The Air Traffic Control Manual, an official, internal document of the FAA prescribes air traffic control procedures and phraseology for use by personnel providing air traffic control services. "Controllers are required to be familiar with the provisions of the handbook which pertain to their operational responsibility and to exercise their best judgment if they encounter situations not covered by it." Air Traffic Control Manual Section 7110.65A Foreword.

straight course while in IFR conditions.

c. Have pilot lower gear and slow aircraft to approach speed while in VFR conditions.

d. Avoid requiring a climb or descent while in a turn if in IFR conditions.

e. Avoid abrupt maneuvers.

f. Vector aircraft to VFR conditions.

The procedures outlined in this section grew out of training given to controllers to help them deal with spatial disorientation.

With the foregoing facts presented to him the District Court resolved the questions of negligence and proximate cause in favor of plaintiff. In the Findings of Fact and Conclusions of Law filed October 12, 1984, the trial judge held that the government was negligent in directing Mr. Rawl to make the turns that were ordered between 8:05:17 p.m. and 8:06:55 p.m. The court further found the government negligent for Hennessey's interpretation of Mr. Rawl's heading report of 8:06:36

p.m. as being 30 degrees and not requesting Mr. Rawl to repeat the report until it was clear.

The court found these acts proximately caused the crash and subsequent death of Mr. Rawl.

The court further found petitioner's decedent lacked any contributory negligence.

The government contended Mr. Rawl was contributorily negligent on two basic grounds. The first being on the basis of an FAA regulation, 14 C.F.R. Section 91.3 (a), which states;

> "The pilot in command of an aircraft is directly responsible for and is the final authority as to the operation of that aircraft."

This defense is commonly called the "pilot in command" defense. Secondly, the government asserted that Mr. Rawl's acceptance of the special VFR after sunset constituted negligence on his part. The

court determined, and the government conceded with reference to the second defense, that at the time of the crash, Mr. Rawl was clearly outside the control zone in VFR conditions with a VFR rating. The court there held that any acts which Mr. Rawl may have done earlier with regards to accepting a special VFR simply were not proximate to the crash.

With regards to the pilot in command defense, the court again found there was no causal connection between Mr. Rawl's crash and his reliance on the weather as he knew had it had been when he left Myrtle Beach and as it had been forecast by the government via flight service in making his decision to pursue his course to Myrtle Beach. The court very clearly found the acts which the government contended constituted contributory negligence on the part

of Mr. Rawl had no causal connection whatsoever to the crash and subsequent death of Mr. Rawl.

The Fourth Circuit Court of Appeals begins its discussion by upholding the District Court's findings of negligence on behalf of the government. The court then recites Federal Rule of civil procedure 52(a) which prohibits the court from setting aside findings of fact unless clearly erroneous and cases that support this rule, including the recent Supreme Court case of Anderson v. City of Bessemer City, 470 U.S. _____, 105 S.Ct. 1504 (1985). The court, in the next sentence, in essence states that if it characterizes the District Court in the instant case as having made a mistake in the rule of law or a mistake in the application of law to the facts, it would be permitted to correct the error without regard to the

"clearly erroneous" standard. In an opinion decided December 4, 1985, the Fourth Circuit reversed the District Court by stating,

> "From the facts, we conclude that, as a matter of law, Rawl was not only negligent, but contributorily negligent as well."

A timely petition for rehearing and suggestion for rehearing en banc was denied on January 21, 1986.

REASONS FOR GRANTING THE WRIT

(1)

Certiorari Should Be Granted to Review the Fourth Circuit's Practice of Circumventry the Protections Afforded the Findings of Fact of a Trial Court Under Rule 52 (a), Federal Rules of Civil Procedure, by Characterizing its De Novo Findings of Fact as Corrections of the District Court's Error of Law.

The Fourth Circuit Court of Appeals decision in this case is a direct statement of how it intends to circumvent Federal Rule of Civil Procedure 52(a) and this court's very recent admonition to the Foourth Circuit for misapplying 52(a) in Anderson v Bessemer City 407 U.S. _____, 105 S.CT.1504 (1985). In the instant case, the Court of Appeals makes reference to the Anderson decision which dictates that findings of fact of a lower court may be overturned only when "clearly erroneous," and then

quite amazingly says it need not apply the "clearly erroneous" standard if it recharacterizes findings of fact as matters of law. This portion of the order bears repeating:

> "Of course, we are aware of the limits placed upon us as an appellate court reviewing a trial court's decision. We may not overturn findings of fact unless they are "clearly erroneous" Fed. R. CW. P. 52(a). ... The clearly erroneous rule applies even when the trial court's findings are based upon physical or documentary evidence, or inferences from the facts. Anderson v City of Bessemer City, 407 U. S. _____, 105 S.CT. 1504 (1985). In the case sub judice, however, we find a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts. Characterized in either fashion, the situation permits us to correct the error in the District Court.[9]" App.pp 48-49. (Emphasis added)

After espousing the above proposition the Court of Appeals goes on to decide

> "From the facts, we

> conclude that, as a matter of law, Rawl was not only negligent, but contributorily negligent as well." App.p 51

The Fourth Circuit improvidently determined that by making findings of fact as a matter of law, they cease to be findings of fact.

The Fourth Circuit improvidently determined in this case that if it reversed the lower court's findings of fact "as a matter of law" and reinstated its own, it was not making findings of fact.

This theory is inconqruous. When a court finds a fact "as a matter of law" it is determining there is but one reasonable inference to be taken from the evidence under South Carolina law, Kennedy v Custom Ice Equipment Co. Inc.,246 s.e. 2d 176, 271 S.C. 171 (1978);

Brown v Howell 327 S.E. 2d 659

(S.C. App. 1985); Darter v Greenville Community Hotel Corp., 301 F. 2d 70 (1962).

Determinations that there is but one reasonable inference to be drawn from the facts presented are to be made by the trial court and usually when determining whether to submit an issue of fact to a jury. The corresponding standard at the appellate level is the "clearly erroneous" test. Hence, the Court of Appeals cannot circumvent the appropriate standards by denoting they have made their findings of fact as a matter of law.

Although the Fourth Circuit stated it made its findings as a matter of law it never addressed the question regarding contributory negligence whether there was but one reasonable inference to be drawn from the evidence in the record. The reason the Court of Appeals failed to so

mention is because where there is more than one permissible view of the evidence, the fact finder's choice between them cannot be clearly erroneous. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982); Anderson v City of Bessemer City 407 U.S. _____, 105 S.Ct. 1504 (1985). In making its skewed view of the facts, the Fourth Circuit Court of Appeals has done precisely what Rule 52(a) guards against. That is, it has made an independent, de novo finding of fact without regard to the lower court's determination. If this be the appropriate workings of the appellate courts then today in Maryland, Virginia, West Virginia and the Carolinas, the rule of federal district judges in cases involving negligence findings of fact is merely to compile the record on which the Fourth Circuit

will base its de novo determination. In any case in which a district judge decides to role for the plaintiffs, the drafting of the findings of fact and conclusions of law required by Rule 52(a) is generally pointless, since such findings will ordinarily carry no weight and should this court make demand that findings of fact be given weight as it did in Anderson Id., then the Fourth Circuit will simply rename them and then disregarad them on appeal by making its own findings of fact and say they are making them as "matter of law."

Tragically, the Fourth Circuit acknowledged that the facts of this case were complex, yet disregarded the deference to be given to the trial judge's position in seeing and hearing the evidence first-hand.

As an alternative position the Fourth Circuit in footnote nine states that the "clearly erroneous" standard is inapplicable where the court is reviewing mixed questions of law and fact. App.p. 49. In support of this proposition, the court cites decisions from the Second, Third, and Tenth circuits. Noticeably absent are citations from the Fourth Circuit and a close examination of those cases reveals why. The matter is well settled in the Fourth Circuit. Where there are mixed questions of law and fact the Fourth Circuit applies the "clearly erroneous" standard of review. See Tucker v Calmar S.S. Corp 457 F.2d 440 (4th Cir 1972). See also Kloster v Steamship Chatham 475 F 2d 43 (4th Cir. 1973).

The Fourth Circuit simply cannot correctly state that it is making no finding of facts when,in

actuality, it finds many of the facts to be opposite to those determined by the District Court. Questions of fact have been defined as those whose resolution is based ultimately on the application of the fact finder's human conduct. Likewise, legal conclusions are those based in application of a legal standard. See Note, "Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has application of the clearly erroneous rule been clearly erroneous." 52 St. John's L.Rev. 68 (1977). The Fourth Circuit's decision is replete with such contra findings, however, petitioner gives the following as exemplification.

The District Court finds that Mr. Rawl was reasonable to rely upon the conditions as he knew them when he departed frcm Myrtle Beach for the short trip to Greenville

and on the weather forecasts which were reported by the Flight Service Station (that have been shown to be incorrect) in deciding to make the return flight to Myrtle Beach. The District Court further found that the deterioration of weather conditions following Mr. Rawl's departure was most unusual. When Mr. Rawl departed he had experienced no problem with the cloud cover obscuring his view. There were certainly other VFR pilots, namely 6996 Yankee and 46309 Baron, in the vicinity along with Mr. Rawl. Without any mention that the finding by the District Court was clearly erroneous, the Fourth Circuit, citing nothing in the record as support, makes the sweeping determination that

> "When he, Rawl, departed Greenville on the return flight, he knew or should have known that conditions precluded VFR landing at Grand Strand." App p. 51.

Likewise and without citing any support in the record the Fourth Circuit states

> "... it is at least true that Rawl was flying in circumstances that a reasonable pilot with similar qualifications, or perhaps, more accurately with similar lack of qualifications would have shunned." App.p. 50

Such a broad indictment of plaintiff's decedent is tragic, especially when, if the court of appeals had reviewed the record it would have realized that it is uncontroverted that at the time the turns commenced, as directed by Hennessey, Mr. Rawl was flying in VFR conditions for which he was undisputably qualified. App.p. 50. The record further reflects that instrument qualification is not necessary for VFR flying. There were, incidentally, at least two other VFR pilots attempting to land at Myrtle Beach at approximately

the same time.

The District Court further determined that Mr. Rawl was unaware of the difficulty that Cessna 46309 experienced in trying to land. The District Court had presented to it the actual tapes of the transmissions, printed transcript from those tapes and two air traffic control experts to help it make that determination. Again the Fourth Circuit without finding the District Court clearly erroneous and without any reference to the record states, "...Rawl was on the same frequency as that of the Cessna..." App.p. 51.

As a further finding of fact, characterized as a correction of an error of law the Fourth Circuit states "Rawl insisted upon landing at Grand Strand despite the conditions there..." That the Fourth Circuit could and would make a determination of Mr. Rawl's state

of mind without any credible evidence and certainly without citation from the record is disturbing. This finding concerning the state of mind of Mr. Rawl prior to the crash comes completely "out of the blue."

Based upon the foregoing findings of fact or, as the Fourth Circuit calls them, errors in law, the Fourth Circuit concludes that Mr. Rawl was "not only negligent but contributorily negligent." It is notable that the Fourth Circuit's statement appears to imply that contributory negligence is something more than or worse than negligence, however, South Carolina law is clear that contributory negligence is the negligence of a claimant which contributes to his injury. Taylor v Bryant 265 S.E. 2d 514, 274 S.C. 509 (1980).

Findings of proximate cause,

like determinations of negligence, are findings of fact. Hawkins v Southern Ry. Co. 45 FRD. 459 (1968); Graham v Whitaker 321 S.E. 2d 40, 282 S.C. 393 (1984). The District Court clearly found no activity on behalf of Rawl proximately caused his injury which finding is essential to a determination of contributory negligence. Graham Id. In order to have found Mr. Rawl contributorily negligent, the Fourth Circuit necessarily must have made a finding of fact of proximate cause. In order to do this, the Fourth Circuit had to replace its finding of proximate cause for the District Court's finding of no proximate cause. To do this, the Court of Appeals necessarily is squarely within Rule 52(a) and Anderson. Supra. The court of appeals cannot make this substitution unless the District

Court's finding is "clearly erroneous." Again, however, the Court of Appeals ignored 52(a) and yet "concluded that Rawl's negligence was a concurrent proximate cause of the crash..."

The Court of Appeals further ignored the substantive law of South Carolina to which it is bound as the accident occurred in South Carolina. Richards v United States, 369 U.S. 1 (1962).

The clear rule in South Carolina is that the issues of negligence, contributory negligence and proximate cause are questions of fact for the jury, the trier of fact. Graham v. Whitaker, 321 S.E. 2d 40, 282 S.C. 393 (1984); Merriman v. Sea Pines Plantation Company., 294 S.E. 2d 423, 278 S.C. 263 (1982). Contributory negligence only becomes a matter of law when the evidence admits but one reasonable inference. House v.

European Health Spa, 239 S.E. 2d 653, 269 S.C. 644 (1977); Williams v Kinney, 226 S.E. 2d 555, 267 S.C. 163 (1976).

Where evidence is susceptible to more than one reasonable inference on the issue of contributory negligence, the issue must be determined by the trier of facts. Willis v. Floyd Brace Company, Inc., 309 S.E. 2d 295, 279 S.C. 458 (S.C. App. 1983).

Clearly, more than one reasonable inference was permissible from the evidence in the record. Rather than addressing whether the District Court's findings were reasonable inferences, the Fourth Circuit merely ignored the law of South Carolina and made its own de novo review of the record and concluded that Mr. Rawl was contributorily negligent and that his negligence was a "concurrent proximate cause

of the crash."

The Court of Appeals makes much of the District Court's discussion of intervening and superceding negligence on the part of the government. This discussion was based upon an arguendo assumption that petitioner's decedent was contributorily negligent. The court, however, made its findings of negligence prior to and independent of this intellectual inquiry. The court was careful at the end of this discussion to reiterate that it was not finding Mr. Rawl contributorily negligent.

The Court of Appeals states it is making no findings of facts and therefore need not heed the admonitions of Federal Rule of Civil Procedure 52(a). A comparison of the two decisions reveals most emphatically the two courts viewed the facts from the

positions diametrically opposed. In fact, the only essential fact on which these courts concur is that had Mr. Rawl not been flying the evening of February 17, 1978, there would have been no crash. This Petitioner prays this court protect for this individual and for other appellees, the protections and directives of Rule 52(a) and this court's decision in Anderson v. City of Bessemer City Supra.

(2) Certiorari Should Be Granted To Resolve A Conflict in the Circuits and Within the Fourth Circuit Regarding whether Rule 52(a), Federal Rules of Civil Procedures Forbids Appellate Review of Trial Court Findings of Negligence as Findings of Fact.

There is a lack of uniformity among the circuits and within the Fourth Circuit on the scope of review by an appellate court of a trial court's findings of negligence.

A majority of the circuits apply the ruling of McAllister v. United States, 348 U.S. 19 (1954). In McAllister, the District Court found a shipowner negligent for permitting conditions to exist upon a ship conducive to the transmission of polio, and as a result the plaintiff was exposed to and contracted the disease. The Second Circuit Court of Appeals reversed the District Court on the ground that the negligence of the shipowner was not shown to have been the proximate cause of the polio and that the trial court's finding could not be sustained.

On certiorari, this court reversed the appellate court as clearly erroneous in view of the evidence in the case, and reinstated the judgment of the District Court. This court said:

> "On evidence showing these facts, including

> the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities and in furnishing the crude and exposed latrine provided on the deck of the ship...Of course, no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon the balance of the probabilities, it seems a reasonable inference for the District Court to make from the facts proved..., that Petitioner was contaminated by the Chinese who came aboard the ship...Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous...We think it was an allowable judgment of the District Court and the judgment of the Court of Appeals is reversed." 348 U.S. at 22-23.

The court in McAllister concluded that the findings of the District Court regarding negligence and causation were not clearly

erroneous, thereby holding that findings of negligence are reviewable only under the "clearly erroneous" standard.

A majority of the courts of appeal have applied the ruling in McAllister in determining that findings of negligence and contributory negligence are reviewable under the "clearly erroneous" standard. Oblensky v. Saldana Scohmier, 409 F.2d 52 (1st Cir. 1969); Nelson v. Jacksonville Shipyards, Inc., 440 F.2d 668 (5th Cir. 1971). This standard has also been applied to the related issue of proximate cause Quinn v. United States, 439 F.2d 335 (8th Cir. 1971); Bethelem Steel Corp. v. Yates, 438 F.2d 798 (5th Cir. 1971)

The Second Circuit, however, has tended to traditionally ignore McAllister by determining that findings of negligence are not subject to the "clearly erroneous"

standard. The Second Circuit continued to apply this view after McAllister without even discussing the applicability of McAllister. Verbeeck v. Black Diamond S.S. Corp., 269 F.2d 68, cert. den. 361 U.S. 934 (1961); Dale v. Rosenfeld, 229 F.2d 855 (2d Cir. 1956). The Second Circuit held in Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, cert. den. 385 U.S. 835 (1966), that its view that negligence findings were freely reviewable was sound despite McAllister.

More recent cases decided by the Second Circuit indicate a possible shift in its position regarding the reviewability of negligence findings. In two cases decided in 1974, the court strengthened the deference to be given to findings of negligence by a trial court by holding that although findings of negligence are

reviewable as findings of law, they should not be overturned by the appellate court unless the lower court manifests an incorrect conception of the law. Whelan v. Penn Central Co.; 503 F.2d 886 (2d Cir. 1974) and Erie Lackawanna Ry Co. v. Timpany, 495 F.2d 830 (2d Cir. 1974).

The Second Circuit has even gone as far as to uphold findings of negligence on the ground that it could not hold the findings were clearly erroneous. Fuchstadt v. U.S., 434 F.2d 367 (2d Cir. 1970). Fuchstadt involved an action for negligence against the United States for personal injuries resulting from an automobile accident. The Second Circuit stated:

> "We are not left here with a definite and firm conviction that a mistake has been committed by the trial judge,... and hence we are unable to hold that these findings of

> fact (emphasis ours) are clearly erroneous within the meaning of Rule 52(a)...".

The Third Circuit has been influenced by the Second Circuit decisions. Prior to 1967, the decisions of the Third Circuit had held that findings of negligence, contributory negligence and proximate cause could not be set aside unless clearly erroneous regardless of what the Court of Appeals would have found if charged with the responsibility of the finding in the first place. Wiseman v. United States, 327 F.2d 701 (3rd Cir. 1964) and Pennsylvania Railroad Co. v. S.S. Marie Leonhardt, 320 F.2d 262 (3rd Cir. 1963).

In 1967, however, the Third Circuit departed from is earlier decisions to hold that a finding of contributory negligence is one of law and is reviewable on appeal

free from the restrictions of the clearly erroneous standard. Nolan v. Sullivan, 372 F.2d 776, 778 (3rd Cir. 1967). In Nolan, an action was brought for wrongful death resulting from an automobile accident. The District Court found that the defendent was guilty of negligence and that the decedent was guilty of contributory negligence. The Third Circuit reversed on the grounds that the conclusion that the decedent had been contributorily negligent was a conclusion of law reviewable freely upon appeal and not subject to Rule 52(a).

The Fourth Circuit has vacillated between the view traditionally espoused by the Second Circuit that findings of negligence are findings of law and are freely reviewable, and the view that the clearly erroneous standard applies to negligence findings.

Prior to 1966, the Fourth Circuit generally applied the clearly erroneous standard to findings of negligence. Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962). Darter involved an action against a hotel owner for personal injuries to a guest who was scalded. The Fourth Circuit held that negligence and contributory negligence are questions for the trier of fact, or the judge sitting without a jury. The court further held that the established rule is that findings of fact of the District Court

> "may not be set aside unless clearly erroneous-that is, unless unsupported by substantial evidence, unless against the clear weight of the evidence or unless induced by an erroneous view of the law."

The court then cited Rule 52(a). Factual questions settled by the findings of the District Court must be accepted by the

appellate court. Thompson v. United States, 268 F.2d 426 (4th Cir. 1959).

In Johnson v. U.S., 336 F.2d 801 (4th Cir. 1964), the Fourth Circuit again applied the clearly erroneous test to the District Court's finding of no negligence on the part of the defendant. In Johnson, an action was brought under the Federal Tort Claims Act for the wrongful death of a child run over by a bus. The court upheld the findings of no negligence by the District Court on appeal. The court stated that it was for the District Judge to make the subsidiary and ultimate findings and that his findings were binding upon appeal.

The clearly erroneous standard was again applied in Taylor v. U.S., 360 F.2d 488 (4th Cir. 1966), a case involving negligence and contributory negligence findings.

The District Court refused to conclude that the defendant was negligent and found that the plaintiff was contributorily negligent. The Fourth Circuit held that the findings of the District Court regarding negligence and contributory negligence were not clearly erroneous. The court stated:

> "Negligence and the capacity for it are questions of degree. The district judge was better positioned than are we to make the gradation judgment. It is neither appropriate nor necessary to determine whether we agree with his decision. It is enough that his determination is supported by substantial evidence and is not clearly erroneous." Id. at p. 490.

In 1966, however, in Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), the Fourth Circuit sharply departed from its earlier decisions by stating that it would adhere to the "general rule" that a

finding of negligence was freely reviewable. Hicks involved an action under the Federal Tort Claims Act alleging negligence of a doctor in diagnosing and treating a patient's illness. The District Court dismissed the case on the grounds of insufficient evidence to establish negligence or proximate cause. The Fourth Circuit reversed, holding that the doctor was negligent and that this holding was not inconsistent with Rule 52(a). The court stated that Rule 52(a) comes into play where the trial judge as fact finder has reconciled conflicting testimony or evidence and prevents a disturbance of those findings unless clearly erroneous, however, where the trial court's conclusions are

> "based on undisputed facts, they are not entitled to the finality customarily accorded basic factual findings under Rule 52(a)..."

The court in Hicks did not refer at all to its earlier decisions, which had generally applied the clearly erroneous standard to findings of negligence.

The Hicks decision has been severely criticized in the Fourth Circuit case Bonds v. Mortensen and Lange, et al, 717 F.2d 123 (4th Cir. 1983). In Bonds, a shipowner, challenged the District Court's findings of fact regarding the "responsibility and fault" of the shipowner for the injuries and death of a longshoreman by contending that the findings of the District Court regarding "responsibility and fault" were mixed questions of law and fact which were not entitled to the protection of the clearly erroneous standard of Rule 52(a), but rather subject to full review under Hicks. The Fourth Circuit disagreed that the findings were subject to full

review under Hicks The Fourth Circuit disagreed that the findings were subject to full review under Hicks and stated:

> "More recent decisions of our circuit indicate that the ruling in Hicks on this point has to a large degree been abandoned, see Famous Knitware Corp. v. Drug Fair, Inc., 493 F.2d 251, 253 n.2 (4th Cir. 1974), and indicate that a District Court's findings of negligence are generally treated as findings of fact reviewable under Fed. R. Civ. P. 52(a). Scheel v. Conboy, 551 F.2d 41, 43 (4th Cir. 1977); Lane v. United States, 529 F.2d 175, 180 (4th Cir. 1975); Kloster v. Steamship Chatham C.A., 475 F.2d 43, 44 (4th Cir. 1973); Tucker v. Calmar Steamship Corp., 457 F.2d 440, 444 (4th Cir. 1972)"

The other eight of the eleven circuits follow the majority view that findings of negligence cannot be disturbed by an appellate court unless clearly erroneous.

The Supreme Court's decision in McAllister v. United States, 348 U.S. 19 (1954), and the recent

Supreme Court decision Anderson v. City of Bessemer City, Supra. support this majority view.

In Anderson, the Fourth Circuit was held by this court to have misapplied the clearly erroneous standard in overturning the District Court's finding of sex discriminaiton. In Anderson a female teacher with college degrees in social studies and education applied for and was rejected for a job managing a city's recreational facilities and programs. A male who had recently graduated with a degree in physical education was chosen for the position. The selection was made by a committee.

After a trial in which testimony from Anderson, the male applicant who was hired, and members of the committee was heard, the District Court found that Anderson had been denied the position because of her sex.

The Fourth Circuit reversed the District Court's decision, holding that the District Court's findings were clearly erroneous. On certiorari, this Court held that the Fourth Circuit misapprehended and misapplied the clearly erroneous standard and thereby comitted error, and reversed the decision of the Fourth Circuit. This Court stated that a finding of intentional discrimination is a finding of fact and as such, the standard governing appellate review is that set forth in Federal Rule of Civil Procedure 52 (a)"

This court then discussed the meaning of "clearly erroneous" and stated:

> "A finding is `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 92 L Ed

746, 68 S. Ct. 525 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. `In applying the clearly erroneous standard to findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 23 L Ed 2d 129, 89 S. Ct. 1562 (1969). If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 94 L Ed 150, 70 S. Ct. 177 (1949); see also Inwood

> Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 72 L Ed 2d 606, 102 S. Ct. 2182 (1982)." Anderson, Supra.

This court further stated that Rule 52 does not exclude any particular categories of factual findings from the appellate court's obligation to accept a District Court's findings unless clearly erroneous. Deference is given to the trial judge as the original finder of fact because of his superior position.

> "For these reasons, review of factual findings under the clearly erroneous standard-with its deference to the trier of fact-is the rule, not the exception." Anderson, Supra.

The Fourth Circuit erred in its application of the clearly erroneous standard and conducted what amounted to a de novo weighing of the evidence in the record.

Based on its review of the

record, this Court refused to find that the District Court's interpretaion of the facts in Anderson was illogical or implausible and declined to find them clearly erroneous, and therefore reversed the appellate court.

In addition to the existence of a conflict regarding the reviewability of negligence findings within the circuits and within the Fourth Circuit itself, there is a conflict present in the instant case between the law of South Carolina and the law applied by the Fourth Circuit.

A federal District Court and federal Court of Appeals must apply the law of the state in which it is sitting. Richards v. United States, 369 U.S. 1, 10 (1962). Therefore, in the instant case, the Fourth Circuit was required to apply South Carolina law regarding negligence,

contributory negligence and proximate cause.

The law of South Carolina is replete with the proposition that the issue of the existence of negligence or contributory negligence is a question of fact and not of law. Graham v. Whitaker, 321 S.E. 2d 40, 282 S.C. 393 (1984); Darter v. Greenville Community Hotel Corp., 301 F. 2d 70 (4th Cir. 1962). The South Carolina Supreme Court has held that in a neglience action, issues of negligence, contributory negligence and proximate cause are questions of fact for the jury, the trier of fact, and if more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit the issues to the jury. Graham v. Whitaker, Supra; Merriman v. Sea Pines Plantation Co., 294 S.E. 2d 423, 278 S.C. 263 (1982).

Under South Carolina law, contributory negligence only becomes a matter of law when the evidence admits but one reasonable inference. House v. European Health Spa, 239 S.E. 2d 653, 269 S.C. 644 (1977); Williams v. Kinney, 226 S.E. 2d 555, 267 S.C. 163 (1976). Where evidence on the issue of contributory negligence is susceptible to more than one reasonable inference, the issue must be determined by the trier of fact. Willis v. Floyd Brace Co., Inc., 309 S.E. 2d 295, 279 S.C. 458 (S.C. App. 1983).

In the instant case, the Fourth Circuit ignored the applicable law of South Carolina by finding contributory negligence on the part of Mr. Rawl as a finding of law. There was clearly more than one reasonable inference to be drawn from the evidence, therefore the issues of negligence and

contributory negligence were questions of fact for the trier of fact, rather than questions of law.

The Fourth Circuit failed to even address whether the District Court's decision as to its findings of no contributory negligence on the part of Mr. Rawl was a reasonable inference from the record. The court merely concluded from its de novo review of the record, that Mr. Rawl was contributorily negligent "as a matter of law", thereby ignoring the applicable law of South Carolina.

Certiorari should be granted to resolve these conflicts on the issue of the reviewability of findings of negligence as findings of fact.

Conclusions

For the above reasons, a writ of certiorari should issue to

review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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STATE OF SOUTH CAROLINA) CERTIFICATE OF FILING
COUNTY OF CHARLESTON)

PERSONALLY appeared before me G. Daniel Bowling, who being duly sworn, deposes and says that he has knowledge of the mailing of the Petition for Writ of Certiorari in the case of Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr. vs. United States of America to the correct address for the Office of the Clerk, Supreme Court of the United States, Washington, D.C. for filing.

That said original and forty (40) copies were placed in a package with prepaid first class postage by depositing said package and contents in the United States Mail at Charleston, South Carolina on March 22, 1986.

That to his knowledge the said original and forty (40) copies were mailed within the sixty (60) day time period for filing.

G. Daniel Bowling
Counsel of Record

Sworn to before me this 22nd day of March, 1986.

Notary Public for the State of South Carolina
My Commission expires: August 22, 1995

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Diane Schafer Goodstein, who being duly sworn, deposes and says that she served three (3) copies of the attached Petition Writ of Certiorari in the action of Julian W. Rawl, as Administrator of the Estate of Edwin E. Rawl, Jr. vs. United States of America to the person hereinafter named, at the place and address, by placing said copies in a package with prepaid first class postage and by depositing said package and contents in the United States Mail at Charleston, South Carolina pursuant to Rules 28.4 and 28.5 of the Rules of the Supreme Court. Affiant further states that all parties required to be served have been served.

Diane Schafer Goodstein

Solicitor General
Department of Justice
Washington, DC 20530

Sworn to before me this 22nd day of March, 1986.

Virginia C. Zuckowski
Notary Public for the State of South Carolina
My Commission expires: August 22, 1985

85-1742

NO. _____

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Julian W. Rawl, Administrator of the
Estate of Edwin E. Rawl, Jr.,
Petitioner,

v.

United States of America.

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APPENDIX

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==========

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

JULIAN W.RAWL, as Administrator of the Estate of Edwin E. Rawl, Jr.,	)	CIVIL ACTION NO. 2:80-2525-2
Plaintiff,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This is an action brought under the Federal Tort Claims Act. 28 U.S.C. Section 2671, et seq. The Plaintiff, Julian W. Rawl, is administrator of the estate of Edwin E. Rawl, Jr. The claim arises out of an airplane crash which occurred on February 17, 1978, near the Grand Strand Airport at Myrtle Beach, South Carolina, and which took the lives of Edwin

E. Rawl, Jr. and his wife, Josie W. Rawl.

The Plaintiff, in his complaint filed December 23, 1980, claims that the Defendant's agents and employees, acting within the course and scope of their employment with the Defendant, and in particular one air traffic controller, violated certain Federal Aviation Administration ("FAA") regulations and procedures, and committed other acts of negligence, which led to the crash. The Defendant, by answer filed February 24, 1981, denied the Plaintiff's allegations, and asserted various affirmative defense, including contributory negligence of the pilot, Edwin E. Rawl, Jr.[1] ("Mr. Rawl.").

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[1]The Defendant does not specifically assert the contrbutory negligence of Mr. Rawl in its answer. The defendant does aver

that the Plaintiff's alleged injuries "were due solely to the acts and omissions of others." (Defendant's Answer, affirmative defense #3). The defendant also alleges that "(t)he sole proximate cause of this Plaintiff's injuries was the negligence of the Plaintiff Jose (sic) Rawl." (Defendant's Answer, affirmative defense #4). Rule 8(c) of the Federal Rules of Civil Procedure requires that an affirmative defense be pled if a party intends to rely upon it. This rule has been construed to mean that such defenses may be pled in general terms, and are sufficient if they give defenses may be pled in general terms, and are sufficient if they give the Plaintiff "fair notice of the nature of the defense." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE Section 1274 (1969).

Although the Defendant in the instant action failed to specifically denominate the affirmative defense of contributory negligence, there is no doubt the Plaintiff was aware that the Defendant intended to rely on such a defense. In his pretrial brief submitted to the court, the Plaintiff referred to the contributory negligence of Mr. Rawl as one of the issues in this case. Adhering to the command of Federal Rule of Civil Procedure 8 (f) that "pleadings should be so construed as to do substantial justice," this court has no trouble in holding that the Plaintiff was put on notice that the Defendant intended

On May 26, 1983, this Court entered an order of dismissal in this case, allowing the parties sixty days to reopen the action if the settlement was not consummated with that time period. The case

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to rely on the affirmative defense of contributory negligence of Mr. Rawl.

Further, Federal Rule of Civil Procedure 15 (b) allows the court to treat issues not raised by the pleadings, but tried by the express or implied consent of the parties, to "be treated in all respects as if they had been raised in the pleadings." There is absolutely no question that the issue of the contributory negligence of Mr. Rawl was fully tried by the parties, and the court can see no prejudice which would inure to the Plaintiff by the consideration of this issue. There was no objection by the Plaintiff to the introduction of evidence by the Defendant going to prove its defense that Mr. Rawl was contributorily negligent in causing the accident. There is also no indication that the Plaintiff has been prejudiced by the trial of that issue, or was unable to meet it. 6 C. WRIGHT & A. MILLER, supra, Section 1492. Therefore, the court will consider the affirmative defense of the contributory negligence of Mr. Rawl as if that issue had been raised specifically in the Defendant's answer.

was subsequently reopened when the Court was informed that a companion case, Josie B. Rawl, as Administratrix of the Estate of Josie W. Rawl, v. United States of America, C.A. # 80-2524-2, filed December 23, 1980, was that case to which the settlement applied. On August 15, 1983, this Court denied the Defendant's motion to set aside the judgment in C.A. # 80-2524-2 or, alternatively, to include C.A. #80-2525-2 in that settlement.

The matter came on for trial on August 31 and September 1 and 2, 1983. The parties were then given until September 9, 1983, to submit post-trial proposed findings of fact and conclusions of law. Oral arguments were made by the parties on January 17, 1984. After weighing the testimony of the witnesses, examining the exhibits introduced, and studying the

applicable law, the Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiff in this matter, Julian W. Rawl, a North Carolina resident, was appointed administrator of the estate of Edwin E. Rawl, Jr., in North Carolina, on March 2, 1978, and appointed ancillary administrator of the Estate of Edwin E. Rawl, Jr., in Charleston County, South Carolina, on October 25, 1982.

2. On or about November 16, 1979, the Plaintiff submitted to the Department of the Air Force of the United States ("Air Force") the claim which is the subject matter of this action. By letter dated June 26, 1980, that agency

denied the claim, and, on December 23, 1980, the Plaintiff filed the complaint in this action in the office of the clerk of court.

3. At all times mentioned herein, the Defendant, action through its agents and employees of the FAA and the Air Force, was in control of and operated the radar approach control ("RAPCON") facility at the Myrtle Beach Air Force Base and the control tower at the Grand Strand Airport. At the time of this incident, the FAA had delegated authority to control civilian planes flying into the Grand Strand Airport to the Air Force. That duty was carried out through the RAPCON facility. The Grand Strand Airport tower did not have radar at the time of this incident.

4. The Plaintiff's intestate, Mr. Rawl, was

certificated by the FAA to fly airplanes under visual flight rules ("VFR"). He was not certificated to fly under instrument flight rules ("IFR"). Generally, flying VFR means a pilot must be able to fly by sight, with a visibility of at least three miles. See 14 C.F.R. Section 91.105 (1983). To fly under IFR, a pilot must, generally, be able to fly relying on his instruments alone. See 14 C.F.R. Section 91.115-.129 (1983).

5. On the afternoon of February 17, 1978, Mr. Rawl left the Grand Strand Airport at Myrtle Beach, South Carolina, at approximately 5:45 p.m., with a planned destination of Greenville, North Carolina. He was flying a 1977 Beechcraft Bonanza, bearing FAA registration number N17523. Mr. Rawl contacted the Myrtle Beach Flight Service Station for weather

information several times during the day, with the last contact at 5:34 p.m. Those forecasts indicated VFR flight conditions were present with hazy visibility and a forecast for deterioration of those conditions towards the middle of the evening. In fact, the weather conditions deteriorated more rapidly than forecast, so that visibility at the Grand Strand Airport was less than two miles at the time Mr. Rawl left the airport with fog and haze present. There was a broken layer of clouds at 500 feet and the same at 3000 feet.

6. Mr. Rawl arrived at the Greenville, North Carolina, airport a short time later and picked up his wife. Twenty minutes later he took off again, heading towards Myrtle Beach, South Carolina, where he and his wife were to be guests at a dinner that

evening at around 8:00 p.m. It was after sunset when Mr. Rawl left Greenville, and the sky was dark.

7. Mr. Rawl first made contact with the Myrtle Beach approach control at or about 7:19:40 p.m.[2] He was told that the weather conditions at the Grand Strand Airport were an estimated ceiling of 400 feet overcast, and visibility of two miles with fog and haze.[3] Air Force Airman Michael Hennessey was the air

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[2]All references to time in this order are given in Eastern Standard Time--hours, minutes, and, in instances where available, seconds.

[3]At the time Mr. Rawl departed the Grand Strand Airport, about ninety minutes earlier, the ceiling had been at 500 feet and scattered, and he had broken out of it at 800 feet and could see all the way through it. There was credible testimony that the weather that evening had deteriorated extensively with unusual rapidity and earlier than was forecast. There was evidence to the effect that an unusually thick fog had settled in the area that evening.

traffic controller who was staffing the RAPCON facility beginning at 7:00 p.m. on February 17, 1978, and was on duty at the time of the crash of the Beechcraft Bonanza N17523.

8. At approximately 7:20:52 p.m., Mr. Rawl informed the RAPCON that he was flying under a VFR rating. Mr. Rawl then requested a special VFR.[4] About seven minutes later, at 7:29:23 p.m., Mr. Rawl reported that he was flying in VFR conditions as he approached the Grand Strand Airport

9. At approximately 7:28:30 p.m. and again at

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[4]The special VFR weather minimums are found at 14 C.F.R. Section 91.107 (1983). Visibility must be at least one statute mile, and the special minimums under this section are inapplicable between sunset and sunrise. In essence, the special VFR allows a pilot to fly within controlled airspace as long as there is at least one mile of visibility and the pilot stays clear of clouds.

approximately 7:42:57 p.m., Mr. Rawl was told to stay clear of the control zone[5] and to expect a ten minute delay.

10. While Mr. Rawl was in a holding pattern, the RAPCON was attempting to bring Cessna 46309 into the airport. Like Mr. Rawl, the pilot of Cessna 46309 was flying with special VFR clearance. That pilot made several passes over the Grand Strand Airport, but was unable to see it. At approximately 7:47:05 p.m., the flight data position at the Grand Strand Airport tower declared Cessna 46309 to be involved in an emergency situation. At approximately 7:50:18 p.m., Cessna 46309 landed, but ended up in the grass at the

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[5]A control zone is "a circular area with a radius of 5 miles and any extensions necessary to include instrument approach and departure paths." 14 C.F.R. Section 71.11 (1983).

airfield. The RAPCON was aware of the difficulty the Cessna had in attempting to land, and that the attempt to get it down safely had been labeled an emergency.

11. At approximately 8:00 p.m., Mr. Rawl was cleared to approach the Grand Strand control zone from the northeast. He was told to maintain special VFR conditions at or below 1500 feet. He was about seven miles from the airport at this time.

12. At approximately 8:03:16 p.m., the RAPCON suggested that a Baron 9669 Yankee could divert to Wilmington, North Carolina, if so desired. The weather at Wilmington was clear with three-mile visibility, fog and haze, which was better than at Myrtle Beach. A similar suggestion was not made to Mr. Rawl, nor did Mr. Rawl hear the suggestion given

to the Baron 9669 Yankee, because he was on a different radio frequency at that time.

13. The next communication with Mr. Rawl was at approximately 8:04 p.m. He informed the RAPCON that he had about four hours of fuel left. He was still flying at 2500 feet, and indicated that he knew he would not be able to see the Grand Strand Airport at that altitude. At or about 8:04:51 p.m., Mr. Rawl asked for vectors[6] to the airport so that he could "slip right down under it." He was told to descend and maintain 1600 feet.

14. At or about 8:05:17

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[6]A vector is a course or compass direction, especially of an airplane. When used as a verb, the term means to guide in flight, by means of a radioed vector. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2537 (1976). A radar vector is a specific heading derived from a radar and given to a pilot.

p.m.,[7] Mr. Rawl was outside the

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[7]Beginning at 8:05:17 p.m., the following conversation took place between Mr. Rawl (523) and RAPCON:

8:05:17 P.M.

RAPCON-FIVE TWO THREE, TURN LEFT HEADING TWO SEVEN ZERO

523-TWO SEVEN ZERO, FIVE TWO THREE

8:06:36 P.M.

RAPCOM-FIVE TWO THREE, SAY YOUR HEADING

523-(ROGER) THREE ZERO

RAPCOM-UH, ROGER, UH TURN RIGHT, TURN RIGHT HEADING ONE TWO ZERO

523-ONE TWO ZERO, FIVE TWO THREE

RAPCON-DID YOU SAY YOU WERE HEADING TWO THREE ZERO?

8:06:53

523-NO SIR, I WAS TURNING, BUT I WAS ON THE THREE ZERO ZERO AT THE TIME YOU TALKED TO US SIR

RAPCON-SIR, MAINTAIN PRESENT HEADING, MAINTAIN PRESENT HEADING AND LET ME KNOW WHAT IT IS

523-ROGER, FIVE TWO THREE IS NOW ON A HEADING OF THREE THREE ZERO, TURNING

8:07:06

RAPCON-OK, TURN LEFT HEADING TWO

control zone, flying in a generally northeast direction, which would be a heading of 045. (Figure 1).

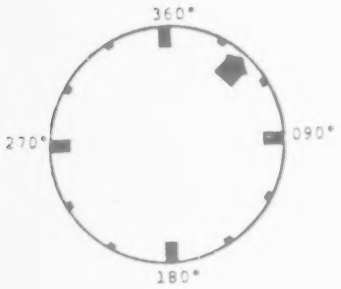

Figure 1: Mr. Rawl's heading at 8:05:17 p.m. (arrow).

At that time he was told by RAPCON to turn left to a heading of 270. This, of course, would have been a left turn of 135°.

15. At or about 8:06:36 p.m., Mr. Rawl was asked to state his heading. He responded that he was on 300, which meant that he had completed 105° to a 270 heading.

TWO ZERO

RAPCON-FIVE TWO THREE, YOU COPY?

(Figure 2).

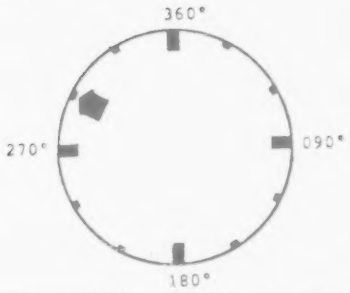

Figure 2: Mr. Rawl's heading at 8:06:36 p.m. (arrow).

Though Mr. Rawl advised that he was at 300, a portion of that communication was inaudible. All Airman Hennessey heard was 30. Instead of asking Mr. Rawl to clarify his answer, however, Hennessey incorrectly assumed that the heading given was 030 and, based upon that false assumption

told Mr. Rawl to turn right to 120. (Figure 3).

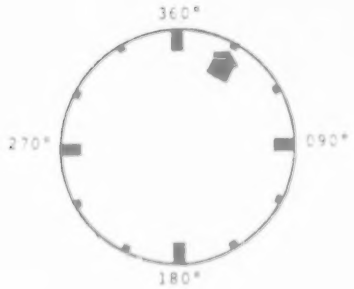

Figure 3: Heading Mr. Hennesey assumed Mr. Rawl had at 8:06:36 p.m. (arrow).

16. One of the other people in the control tower overheard the conversation between Hennessey and Mr. Rawl at about 8:06:36 p.m., and told Hennessey he thought he, Hennessey, had misunderstood Mr. Rawl. Hennessey, therefore, then asked Mr. Rawl for a clarification, which he received at 8:06:53 p.m. At that time Mr. Rawl advised that his 8:06 36 p.m. response had been 300 and also gave

his present heading at 330.

(Figure 4).

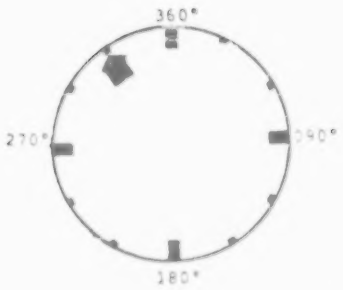

Figure 4: Mr. Rawl's heading at 8:06:53 p.m.

At that time Hennessey told Mr. Rawl to turn left to a heading of 220. The record is not clear as to exactly what Mr. Rawl's heading was before he went into a dive, but it is obvious that he was unable to respond to this last command.

17. During his exchange with RAPCON which began at 8:05:17 p.m., Mr. Rawl maintained an altitude of 2500 feet and 3000 feet, and visibility was probably further limited by the presence of the Atlantic Ocean to the east and an unpopulated area to the west. Although VFR conditions were

present between the cloud layers, darkness limited visibility, and no outside visual references were present for Mr. Rawl to rely on.

18. The end of Mr. Rawl's last transmission at approximately 8:07 p.m. is slurred, with the audio level dropping as if his microphone was being pulled away from his mouth. Shortly thereafter, the RAPCON radar screen showed his plane descending from 2500 feet to about 1600 feet in a space of five seconds. Within five seconds more, the plane had disappeared from the radar screen.

19. Spatial disorientation is a condition which results from a conflict between one's visual clues and inner feelings. When a pilot is deprived of normal visual clues, false sensations may envelope him, and he quite simply may not be able to tell which end

is up. For example, he may have the sensation of climbing when his plane is actually descending. This condition may occur while a pilot is in straight flight if there are uneven light sources, a slanting, uneven cloud bank, or sunlight through haze hitting a propeller. It may also be induced by putting the plane through turns or by head movements by the pilot.

20. Mr. Rawl developed spatial disorientation because he was deprived of outside visual references in the black corridor he was flying through and because he was directed to execute several sharp turns within a period of less than two minutes by Hennessey. As a result of developing that condition, Mr. Rawl lost control of his airplane, which went into a power dive and crashed, killing him and his wife.

That crash occurred outside the control zone of the Grand Strand Airport.

21. Prior to his last communication with RAPCON at approximately 8:06:53 p.m., Mr. Rawl at all times in his communications with Hennessey that evening sounded self-confident and self-assured, and gave no indication of being in any difficulty whatsoever. This is true in spite of the fact that he was flying his airplane under the conditions detailed in Findings of Fact 17 above for at least thirty minutes before RAPCON began directing him to make the turning movements previously described.

22. Hennessey was aware of the difficulties pilots were having in seeing the airport, both from his conversations with Mr. Rawl and with the pilot of Cessna

46309 a few minutes earlier. The Cessna 46309 had made several passes over the airport without seeing it, but was finally able to land.

23. Hennessey had been briefed on spatial disorientation, also known as vertigo or dizziness, during his training to become an air traffic controller. He wa told that to avoid inducing spatial disorientation in a pilot, the controller should avoid having the pilot make excessive turns; that is, "one turn right after another turn right after another." (Hennessey Deposition, p. 195).

24. Hennessey knew, or should have known, that Mr. Rawl was flying in a corridor between two layers of clouds, with no outside visual references.

25. Mr. Rawl knew, or should have known, about the causes

and consequences of spatial disorientation. He was an active pilot who had owned several different planes, beginning in the late 1950's. At the time of his death, he had approximately 2500 to 3000 hours of flight time. Between 20% and 30% of his recent flight time had been at night. He also had experience, as part of his training, with "hood time," which is where an instrument is placed on a person's head to prevent access to outside visual references. The purpose of hood time is to teach one to rely on instruments when flying.

26. Mr. Rawl was born on November 26, 1924. He had three children who survived him. Edwin E. Rawl, III, was twenty-eight years old at the time of his father's death. The Plaintiff, Julian W. Rawl was twenty-five

years old at the time. Both sons worked with their father in the family business, Rawl Industries, which included roller skating facilities, mobile home parks, apartments, and shopping centers. The daughter, Josie B. Rawl, was twenty-three years old at the time of her father's death. She had graduated from college more than a year prior to his death and was working at a recreational facility at Lake Tahoe, California, at the time of her father's death.

27. There was ample testimony that the Rawl family was a very close family. Mr. Rawl was active in scouting and took his family on skiing and camping trips, among other group activities they did together. Josie B. Rawl testified that she had an extremely close relationship with her father, sought advice from him, and was

closer to him than most daughters are to their fathers. Julian W. Rawl testified that his father was his best friend and his business partner. He also testified that he achieved all of his business knowledge and background from his father, and was continually helped in the business by his father.

CONCLUSIONS OF LAW

A. The Court has jurisdiction of this matter pursuant to 28 U.S.C. Section 1346 (b), which provides in pertinent part:

> (T)he district courts... have exclusive jurisdiction of civil actions on claims against the United States... for ... personal injury ... caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant

in accordance with the law of the place where the act or omission occurred.

B. The action was filed in a timely manner, as provided in 28 U.S.C. Section 2401 (b).

C. The claim was filed pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 2671-80. The provision relevant to this action is 28 U.S.C. Section 2674, which provides that "(t)he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

D. The law of South Carolina applies to this case since the alleged negligent act or omission ocurred in South Carolina.

Richards v. United States, 369 U.S. 1, 10 (1962).

E. South Carolina law provides that "(a)ll crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State." S.C. Code Ann Section 55-3-80 (1976). An aeronaut is defined to include an "aviator, pilot, balloonist and every other person having any part in the operation of aircraft while in flight." S.C. Code Ann. Section 55-3-20 (1976).

F. South Carolina has a wrongful death statute which provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party

> injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

S.C. Code Ann. Section 15-51-10 (1976). Such action shall be brought by or in the name of the executor or administrator of such person. S.C. Code Section 15-51-20 (1976).

G. Under South Carolina law, the Plaintiff must prove three elements in order to recover for the negligence of the defendant's agents: negligence (i.e., breach of the applicable standard of care), proximate cause, and

damages. Howard v. Riddle, 221 S.E. 2d 865 (S.C. 1976); Sherrill v. Southern Belkl Telephone and Telegraph Co., 197 S.E. 2d 283 (S.C. 1973). This proof must be by the greater weight or preponderance of the evidence. Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645 (S.C. 1930); Crouch v. Cudd, 155 S.E. 136 (S.C. 1930).

H. In South Carolina, negligence "is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such a person, under the existing circumstances, would not have done." Jones v. American Fidelity & Casualty Co., 43 S.E. 2D 355, 359 (S.C. 1947). In addition, the violation of an applicable statute is negligence per se. Williams v. Hill Manufacturing Co., Inc., 489

F. Supp. 20 (D.S.C. L980).

The FAA regulations have the force and effect of law. Tilley v. United States, 375 F. 2d 678 (4th Cir. 1967). The Air Traffic Control Manual, an official, internal document of the FAA, "prescribes air traffic control procedures and phraseology for use by personnel providing air traffic control services. Controllers are required to be familiar with the provisions of this handbook which pertain to their operational responsibility and to exercise their best judgment if they encounter situations not covered by it." Air Traffic Control Manuals Section 7110.65A, Foreword (Plaintiff's Exhibit 6). See Delta vs. United States, 561 F. 2d 381, 385 (1st Cir. 1977). "The government's duty to provide services with due care to airplane

pilots may rest upon the requirements of procedures manuals spelling out the functions of its air traffic controllers or upon general pilot reliance on the government for a given service." Gill v. United States, 429 F, 2d 1072, 1075 (5th Cir. 1970). Courts have held that "the unexcused violation by a federal employee of procedures established by the government which have as their purpose the protection of those who were in fact harmed constitutes negligence." Delta, Supra, at 393-94. The duty of the air traffic controllers to give warnings and information, and two act in accordance with their manuals, "is based on the simple tort principle that once the Government has assumed a function or service, it is liable for negligent performance." Spaulding v. United

States, 455 F. 2d 222,226 (9th Cir. 1972) (footnotes omitted). See Ingham v. Eastern Air Lines, 373 F. 2d 227 (2d Cir. 1967); Annot., 46 A.L.R. Fed. 24 (1980). Further, "the regulations and manual do not make mere automata of the controllers. Their job requires that they act in the interest of safety, "which includes the obligation of warning pilots who are about to encounter severe hazards. United States v. Furumizo, 381 F. 2d 965, 968 (9th Cir. 1967). Thus, controllers must give warnings beyond those prescribed by the aviation manuals

> when danger is immediate and extreme, United States V. Furumizo, 381 F. 2d 965 (9th Cir., 1967); when danger is known only to federal personnel, United Air Lines, Inc. v. Wiener, 335 F. 2d 379 (9th Cir. 1964); when the controller is better qualified than the pilot to evaluate the actual

> situation, Hartz v. United States, 387 F. 2d 870 (5th Cir., 1968); or when the controller is able to gather more information or make more accurate observations than the pilot. Hochrein v. United States, 238 F. Supp. 317 (E.D. Pa., 1965).

Spaulding, supra, at 226 n.8. Stated differently, the duty of a government agent or employee is not circumscribed by the government's own regulations, policies or manuals, but rather is determined "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law where the act or omission occurred." Himmler v. United States, 474 F. Supp. 914, 929 (E.D. Penn. 1979) (quoting Hennessey v. United States, No. 44551 (N.D. Cal. April 26, 1971).

Section 1592 of the Air Traffic Control Manual is entitled "Radar Assistance Techniques" and

it provides as follows:

> Use the following techniques to the extent possible when you provide radar assistance to a pilot not qualified to operate in IFR conditions:
>
> a. Avoid radio frequency changes except when necessary to provide a clear communications channel.
>
> b. Make turns while the aircraft is in VFR conditions so it will be in a position to fly a straight course while in IFR Conditions.
>
> c. Have pilot lower gear and slow aircraft to approach speed while in VFR conditions.
>
> d. Avoid requiring a climb or descent while in a turn if in IFR conditions.
>
> e. Avoid abrupt maneuvers.
>
> f. Vector aircraft to VFR conditions.

It was a violation of this section, and negligence, for Airman Hennessey to direct Mr. Rawl to make the turns that were ordered between 8:05:17 p.m. and 8:06:53 p.m.[8] Within a span of one minute and thirty-six seconds, Mr. Rawl was directed to turn left 135 degrees, then back to the right 180

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[8] See note 7, supra.

degrees, then back to the left 110 degrees. In fact, during said period of time Mr. Rawl turned 105 degrees to the left and then at least 30 degrees to the right. There is no question but that such turns were abrupt maneuvers, which the section expressly prohibits. See Himmler, supra, at 921. (The procedures outlined in this section grew out of training given to controllers to help them deal with spatial disorientation in pilots.)

Even if we disregard the sections of the Air Traffic Control Manual referred to, Hennessey was still negligent. When he interpreted Mr. Rawl's heading report of 8:06:36 p.m. as being 30 degrees, reasonable prudence and care required that he ask Mr. Rawl to repeat that report until it was clear to him what Mr. Rawl was saying. The report received by

Hennessey was obviously an incomplete one, and he was negligent in relying on the same without clarification.[9] It is also clear that the 8:06:36 p.m. request that Mr. Rawl turn right to a heading of 120 resulted from Hennessey's negligent failure to ascertain Mr. Rawl's correct heading at that time.

I. Proximate cause is properly

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[9]The Air Traffic Control Manual provides that an airplane's heading shall be described as follows:

The word "heading" followed by the 3 separate digits of the number of degrees, omitting the word "degrees." Use heading 360 degrees to indicate a north heading.

Examples.--

Heading	Statement
5 degrees	"Heading zero zero five."
30 degrees	"Heading zero three zero."
360 degrees	"Heading three six zero."

defined as follows:[10]

> The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces that event, and without which that event would not have occurred.
>
> This rule as to proximate cause encompasses two elements (1) cause in fact, and (2) foreseeability .... Both elements must be present .... Cause in fact as an element of proximate cause means that the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have ocurred .... Foreseeability is satisfied by showing that the actor as a person of ordinary

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[10]This is Virginia law. It, however, accurately states the rule in South Carolina and is the most succinct statement thereof which we have found. Yound v. Tide Craft, Inc., 270 S.C. 453M 242 S.E. 2d 671 (1978); Lufkin v. kyle, 275 S.C. 90, 267 S.E. 2d 533 (1980).

> intelligence should have anticipated the danger to others by his negligent act ....

Fritzgerald v. Manning, 679 F.2d 341, 348 (4th Cir. 1982).

Hennessey knew, or should have known, that such turns given to a pilot flying VFR, between two layers of clouds at night, could lead to the onset of spatial disorientation with the resultant tragic consequences. The court concludes that the actions of Hennessey in directing Mr. Rawl through several sharp turns within a very short time span were a proximate cause of the crash and subsequent death of Mr. Rawl. Those turns, combined with the lack of outside visual references, caused Mr. Rawl to develop spatial disorientation and lose control of his airplane, which resulted in the

crash and Mr. Rawl's death.[11]

"Where, as here, a pilot places himself in the hands of the controller and thereafter follows the controller's suggestions or instructions, the pilot is entitled to rely upon such information and directions and is not free or expected to disregard them." Himmler, supra, at 928.

J. Section 1591 of the Air Traffic Control Manual provides as follows:

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[11] In reaching this conclusion, we have adhered to the South Carolina law which we consider to be applicable. It requires that causal connection in this instance be established by expert testimony because the same is not "within the experience and observation of an ordinary layman." Miller v. Atlantic Bottling Corp., 191 S.E. 2d 518 (S.C. 1972). Further, the expert employed to establish causal connection must state that with reasonable certainty the accident complained of most probably resulted from the negligence of the defendant. Armstrong v. Weiland, 225 S.E. 2d (S.C. 1976).

a. If a VFR aircraft requests radar assistance when it encounters or is about to encounter IRF weather conditions, ask the pilot if he is qualified for and capable of conducting IFR flight.

b. If the pilot states he is qualified for and capable of conducting IFR flight, request him to file an IFR flight plan and then issue clearance to destination airport, as appropriate.

c. If the pilot states he is not qualified for or not capable of conducting IFR flight, or if he refuses to file an IFR flight plan, take whichever of the following actions is appropriate:

(1) Inform the pilot of airports where VFR conditions are reported, provide other available pertinent weather information, and ask if he will elect to conduct VFR flight to such an airport.

(2) If the action in (1) is not feasible or the pilot declines to conduct VFR flight to another airport, provide radar assistance if the Pilot:

(a) Declares an

emergency.

(b) Refuses to declare an emergency and you have determined the exact nature of the radar services the pilot desires.

(3) If the aircraft has already encountered IFR conditions, inform the pilot of the minimum safe altitude. If the aircraft is below the minimum safe altitude and sufficiently accurate position information has been received or radar identification is established, furnish a heading or radial on which to climb to reach the minimum safe altitude.

Although Mr. Rawl was about to encounter IFR weather conditions, and the RAPCON knew he was not qualified to fly IFR, Mr. Rawl was never told of airports where VFR conditions were reported, nor was he given available pertinent weather information and asked if he wanted to conduct a VFR flight to another airport. Shortly before the accident, Mr. Rawl was told

that another plane had broken out of the clouds at 600 feet. Hennessey knew, or should have known, that the tops of the lower layer of clouds were at least 1000 feet, yet he did not relay this information to Mr. Rawl. In fact, Mr. Rawl was given no further weather information after the initial information he was given at 7:20:01 p.m., in spite of a change in visibility and wind, and in spite of the speed and intensity with which the weather was deteriorating.[12] The controller did not suggest to Mr. Rawl that

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[12]A weather report was given to the pilot of Beech 7197 November at 8:01:51 p.m. Mr. Rawl did not hear that report, however, as he had been directed to switch to a different radio channel. The same report Mr. Rawl was given at 7:20:01 p.m. was repeated at 7:40:02 p.m. to the pilot of Baron 9669 Yankee. Mr. Rawl was given an updated report on the wind at 7:41:28 p.m. by the Grand Strand tower control position.

the weather was clear at Wilmington and that Mr. Rawl might want to divert there; yet, that exact suggestion was made to another plane just minutes before the crash of Mr. Rawl's plane. Finally, Mr. Rawl was not told of the problems Cessna 46309 encountered in attempting, and finally succeeding, albeit imperfectly, to land. Given this information, it is reasonable to assume that Mr. Rawl might have chosen to land elsewhere, thus avoiding the subsequent crash. See Ingham, supra, at 236-37; Himmler, supra, at 927-28; McCullough v. United States, 538 F. Supp. 694 (E.D.N.Y. 1982); Martin v. United States, 448 F. Supp. 855, 865 (E.D. Ark. 1977, aff'd in part, rev'd in part and remanded, 585 2d 1206 (8th Cir. 1978), noted in Annot., 46 A.L.R. Fed. 24, 137 (1980). Therefore, this breach of duty by

Hennessey also was a proximate cause of the crash and death of Mr. Rawl.[13] "It is clear that there can be more than one proximate cause of an airplane crash." Pierce v. United States, 679 F 2d 617, 622 (6th Cir. 1982).

K. Under the law of South Carolina, contributory negligence will defeat the recovery of damages based upon the negligence of another party. Pilot Freight Carriers, Inc. v. Spivey, 278 F. Supp. 520 (D.S.C. 1967). Contributory negligence is "the negligence of a plaintiff (or plaintiff's intestate) contributing to his injury as a proximate cause without which the injury would not have occurred. Taylor v. Bryant,

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[13]It should also be noted that the court is of the opinion that under the expert witness rule referred to in footnote 11, supra, this conclusion need not be supported by expert testimony.

265 S.E. 2d 514, 516 (S.C. 1980).

The defendant contends that Mr. Rawl was contributing negligent, and, therefore, the Plaintiff should be barred from recovery. This contention is based upon the FAA regulation which states that "(t)he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." 14 C.F.R. Section 91.3(a) (1983). The Defendant conceded that Mr. Rawl was flying within VFR conditions just prior to the crash. It maintains, however, that Mr. Rawl had a duty to obtain all available information, and specifically weather reports and weather forecasts, prior to undertaking the flight. 14 C.F.R. Section 91.5 (1983). Further, the Defendant asserts that Mr. Rawl had access to weather information equal

to that of the RAPCON personnel, and therefore it was negligent for Mr. Rawl to continue with his desire to land at the Grand Strand Airport and to ask for vectors to the airport so he could "slip right down under it," because a reasonably prudent pilot would have sought another landing site.[14]

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[14]The Defendant also asserts that Mr. Rawl was contributorily negligent in requesting a special VFR clearance after sunset. FAA regulations prohibit the operation of an aircraft in a control zone under a special VFR clearance between sunset and sunrise. 14 C.F.R. Section 91.107 (e) (1983). Mr. Rawl was negligent in requesting a special VFR clearance when he did. The accident occurred outside the control zone, when Mr. Rawl was operating in regular VFR conditions, however, and so this negligence could not have been a proximate cause of the crash. Further, the court is concerned about the manner in which special VFR clearances were issued that evening. Section 470 of the Air Traffic Control Manual authorizes special VFR operations "on pilot request only." Yet, the following colloquy took place regarding the Cessna 46309, which was seeking to land at Grand Strand Airport, but had not requested a special VFR

clearance:

7:45:38 p.m.
GRAND STRAND TOWER:
YOU MIND A SUGGESTION?

RAPCON:
NO, GO AHEAD.

GRAND STRAND TOWER:
OK, HOW ABOUT ASKING HIM, OR USE THE WORD CLEARANCE, ASK HIM WHAT TYPE OF CLEARANCE HE IS REQUESTING.

RAPCON:
OK.

GRAND STRAND TOWER:
EXPLAIN TO HIM THAT THE WEATHER IS BELOW, UH, BASIC VFR IN THE CONTROL ZONE, AND THEN IF HE SAYS, WELL, I'D LIKE TO HAVE A SPECIAL

RAPCON:
YEAH

GRAND STRAND TOWER:
THEN YOU CAN BRING HIM RIGHT IN OVERHEAD THE AIRPORT, CAUSE WE DON'T HAVE ANYTHING.

RAPCON:
OK.

GRAND STRAND TOWER:
ALRIGHT, YOU CAN DRIVE HIM RIGHT ON IN, IF HE SEES THE AIRPORT, WE, WE CAN GO FROM THERE.

RAPCON:
OK.

GRAND STRAND TOWER:
BUT IF YOU WERE TO, USE
THE WORD CLEARANCE, MAYE
THAT'LL RING A BELL.

RAPCON:
OK.

It would appear from the above discussion that the controllers were seeking to induce Cessna 46309 to request a special VFR clearance, which would be in derogation of the controller's own manual. It appears that Mr. Rawl probably did request a special VFR clearance, although there did seem to be some prompting from the RAPCON controller, as the following illustrates:

7:20:52 p.m.
RAPCON:
UH, I CAN'T LET YOU IN,
UH, I CAN LET YOU IN
SPECIAL VFR.

523
SPECIAL VFR SUITS ME FINE,
SIR

These exchanges would seem to be further examples of services being provided to pilots that evening which were below the standard of care expected of air traffic controllers and out side the required operating procedure as enunciated in the Air Traffic Control Manual.

L. Assuming arguendo that Mr. Rawl was negligent in pursuing his plans to land at the Grand Strand Airport, the court must then look to the concept of intervening or superseding negligence.[15] The doctrine was recognized in South Carolina in the case of Matthews v. Porter, 124 S.E. 2d 321, 324 (S.C. 1962), which held:

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[15]At or about 8:04:51 p.m., Mr. Rawl was told to descend to 1600 feet. He did not do this and retained an altitude of 2500 feet until he developed spatial disorientation and began the power dive that led to his death. If the Defendant posits that this constituted negligence on Mr. Rawl's part, then this conclusion does not dispose of that contention. A careful review of the record, however, convinces the court that the failure of Mr. Rawl to reduce his altitude as requested by RAPCON in no way whatsoever contributed to the crash complained of and was not, therefore, a proximate cause of Mr. Rawl's death.

> To exculpate a negligent Defendant, the intervening cause must be one which breaks the sequence or causal connection between the Defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the Defendant as one of the proximate causes of the injury. Riggs v. Akers motor line, 233 N.C. 160, 63 S.E. 2d 197.

The test, the court said, "is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events, subsequently arising." Id. at 324. That is to say, "the intervening negligence of a third person will not relieve the wrongdoer to responsibility if such intervention should have been foreseen in the exercise of reasonable care." Mickle v. Blackmon, 166 S.E. 2d 173, 181 (S.C, 1969). See Gardner v. Q.H.S., INC., 448 f. 2d 238 (4th Cir. 1971). In the instant case,

the issue is whether the acts of Hennessey in directing Mr. Rawl through several sharp turns in a short time span, and in not suggesting an alternate landing site and providing additional information to Mr. Rawl, were sufficient to break any causal chain established by Mr. Rawl's own negligence. This case is not analogous to the cases cited by the Defendant where a pilot had equal knowledge of hazardous weather conditions, and yet continued to fly into a storm at his peril, see Black v. United States, 441 F. 2d 741 (5th Cir. 1971), cert. denied 404 U.S. 913 (1971), or continued to fly at an altitude which proved to be too low to avoid a hillside. Redhead v. United States, 686 F. 2d 178 (3rd Cir. 1982). Here, it is reasonable to assume that the pilot would have been able to safely land

his plane[16] in the weather conditions known to both him and the controller had the intervening negligence of the controller not occurred. Although the pilot is ultimately responsible for the safe operation of the aircraft, "the duty to exercise due care to avoid accidents is a concurrent one resting on both the control tower personnel and the pilot."

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[16]As stated in finding of fact number 25, supra, Mr. Rawl was a pilot with considerable flying experience, having logged over 2500 hours of flight time over a twenty-year period. Approximately 20-30 % of his recent flight time had been at night. He exhibited a sense of confidence and assurance in his flying skills, and this was evident in the tone of voice he projected to the controllers on the night in question. Therefore, it is reasonable to assume that if the pilot of Cessna 46309, who seemed much less sure of himself and less knowledgeable of flying than Mr. Rawl, was able to land safely just minutes before Mr. Rawl crashed, Mr. Rawl would have been able to land equally as well had he not been put through the series of sharp turns.

Mattschei v. United States, 600 F. 2d 205, 208 (7th Cir. 1979). The pilot, Mr. Rawl, properly relied on the RAPCON personnel to guide him in safely. The controller, Hennessey, was well aware of the problems pilots were having in seeing the airport that evening. He knew that one plane had landed in such a manner as to end up in the grass at the airport. He knew that Mr. Rawl had enough fuel to fly to another airport; and he knew the sky was dark and layers of clouds were both above and below Mr. Rawl. "Under especially dangerous conditions, controllers must take steps beyond those set forth in the manuals if such steps are necessary to ensure the safety of pilots and passengers." Rudelson v. United States, 602 F. 2d 1326, 1329 (9th Cir. 1979). Whether or not there was negligence

on the part of Mr. Rawl in continuing his journey to the Grand Strand Airport that evening, the acts of negligence on the part of RAPCON personnel, which we have previously concluded constituted proximate causes of the accident complained of, were each intervening and superseding causes which relieved Mr. Rawl of any contributory negligence. "An instant's inattention, a moment's hesitation stood between safety and disaster.: State of Maryland v. United States, 257 F. Supp. 768, 774 (D.D.C. 1966). As Judge Becker said in a well-reasoned dissenting opinion in Redheae, supra, at 189:

> The standards of conduct for air traffic control-· lers are high because the safety of air travelers demands it. The degree of care that constitutes reasonable care under the circumstances is a function of the dangers that are fairly apprehended in those

> circumstances. A few seconds of inattention by a controller always makes possible a tragic, and too often fatal, accident.... Because the Government, through air traffic control, has undertaken to promote safe air travel, pilots and especially passengers are entitled to rely on controllers' full performance of their exacting duties.

While it is true that Mr. Rawl knew, or should have known, of the causes and effects of spatial disorientation,[17] he also should have been entitled to rely upon the directions given by the air traffic controller. "Once he received and followed the controller's instructions with respect to

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[17]Even assuming that Mr. Rawl had information regarding the weather equal to that of the tower personnel, and assuming that he understood the causes and effects of spatial disorientation equally well, this would not necessarily "obviate the need for warning when he is proceeding in the face of extreme danger known to the tower." Stork v. United States, 430 F. 2d 1104, 1108 (9th Cir. 1970).

landing he was not free to disregard the directions given and exercise independent initiative. For all practical purposes, he was in complete control of the tower." Yates v. United States, 497 F. 2d 878, 883 (10th Cir. 1974). It goes without saying that once Mr. Rawl developed spatial disorientation, induced by the turns ordered by the controller, he was unable to extricate himself from his plight as his plane went into a power dive that mere seconds later resulted in the crash. As the court in Yates, supra, at 883, noted,

> (i)t is familiar law that one in the care and custody of another where the circumstances deprive the person exercising the custody shall use reasonable care and caution for his protection. See Restatement of the Law of Torts Second Section 314 and 320.

Mr. Rawl had a reasonable expectation that the RAPCON

personnel would use such due care as the circumstances required to either help him land safely, or to flag him off to another landing site. Obviously, had Mr. Rawl not been flying that night, his crash would not have occurred. But, once he came within the ambit and authority of the RAPCON, those controllers had a duty to use reasonable care to bring him in safely, which duty and resulting breach thereof were not reasonably foreseeable, and, thus, intervened and broke the causal connection to any negligence by Mr. Rawl.[18]

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[18]The foregoing analysis does not mean the court is holding Mr. Rawl to have been negligent at the time of his crash. He was flying in VFR conditions at that time under a VFR rating. He was clearly outside the control zone, so any former negligence in accepting a special VFR clearance would no longer have been applicable. Relying on his recollections of the weather conditions when he left Myrtle Beach earlier in the evening, and the information he

In the instant case, the air traffic controller failed in the duty he owed to Mr. Rawl, by not furnishing information sufficient to make a sound decision as to whether to attempt to land at the Grand Strand Airport. Further, that controller improperly directed Mr. Rawl through several "abrupt maneuvers,"[19] which resulted in the crash and death of Mr. Rawl. Therefore, the Defendant United States of America is liable to the Plaintiff for damages, the next

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received on the flight back to Myrtle Beach, Mr. Rawl elected to pursue his course and attempt a landing at the Grand Strand Airport. The court's ruling that the Defendant's negligence was superseding and intervening, and broke the causal connection of any negligence by Mr. Rawl, makes it unnecessary to determine if Mr. Rawl was, in fact, negligent at the time of the crash.

[19]Not only were the maneuvers abrupt, but they were also unnecessary to achieve the desired end of landing at the Grand Strand Airport.

matter the court must consider.

M. Damages, in a wrongful death action in South Carolina, are governed by S.C. Code Ann. Section 15-51-40 (1976), which provides as follows:

> In every such action the jury may give such damages, including exemplary damages when such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

In determining the damages recoverable under that statute, "the question is not one of the value of the human life lost,

rather it is the damages sustained by the beneficiaries from the death." Lucht v. Youngblood, 221 S.E. 2d 854 (S.C. 1976).

N. The leading South Carolina case determining what elements of damage are recoverable in an action for wrongful death is Mishoe v. Atlantic Coast Line Railroad, 197 S.E. 97 (S.C. 1938). There, the court held such elements to include

> (1) Pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries, in addition to the loss of his ability to earn money for the support, maintenance, care and protection of his wife and children, and for protection of his wife and children, and for the education and training of

the latter.

Id. at 104-05.

The court further said that "it is proper to include all damages, present and prospective, which are naturally the proximate consequence of the wrong act." Id. at 105.

O. One factor the court must look at in fixing pecuniary loss is "the extent to which his statutory beneficiaries `might logically and reasonably have been expected to share in' such prospective earnings." Brooks v. United States, 273 F. Supp. 619, 626 (D.S.C. 1967). At the time of this accident, Edwin E. Rawl, III, was twenty-eight years of age and Julian W. Rawl was twenty-five. They both worked in the family business, and there is no evidence that either of them received any financial support from their father. Josie B. Rawl was twenty-

three years of age. She had graduated from college more than a year before the crash occurred. Although she was working in Lake Tahoe, California, at the time of her father's death, she testified that her income was supplemented by her father in the form of a car, clothes and money for entertaining. There was no testimony as to the manner or amount of this supplementation, ow as to what sacrifices or deprivations Miss Rawl suffered financially as a result of the death of her father. Therefore, the court finds any damages as to pecuniary loss for her would be based upon pure speculation; thus, not compensable. See Brooks, supra, at 626. Likewise, since there was no evidence that the sons relied upon their father for financial support, pecuniary loss would not be a

proper element of loss for them either. Zorn v. Crawford, 165 S.E. 2d 640, 645 (S.C. 1917).

P. The Plaintiff maintains damages should be allowed for the sale of some family property in Virginia. There was not a shred of credible evidence as to what the actual fair-market value of the property was at the time of the sale, or of what loss, if any, the Plaintiff sustained as a result of that sale. There is also no evidence to substantiate the assertion that the sale of the land was causally connected to the death of Mr. Rawl, as opposed to other possible factors, such as a slumping economy. Therefore, the proof of that element, if it be recoverable at all, is much too speculative to allow for recovery.

Q. The Plaintiff also contends that recovery should be

allowed for the mental problems suffered by Edwin E. Rawl, III, after the death of his father. The Plaintiff submits a Fifth Circuit Court of Appeals case applying Florida law for the proposition that "(t)he mental condition of a parent resulting from the wrongful death of a child is a proper matter for consideration in fixing damages for mental pain and suffering." Georgia Southern & Florida Railway v. Perry, 326 F. 2d 921, 926 (5th Cir. 1964). The South Carolina Supreme Count has intimated that where the shock of his father's death necessitated the hospitalization of a boy, who was thirteen years old at the time of trial, that was a matter properly considered by the trial court in rejecting a motion attacking a verdict as excessive. Sloan v. Edgewood Sanatorium, 80 S.E. 2d

348, 354 (S.C. 1954). While grief or mental suffering is a recoverable element of damage under the South Carolina wrongful death act, the court is of the opinion that such does not include the manifestations of a heretofore dormant manic-depressive illness. Rather, those terms for elements of damage encompass "the natural feelings of grief," Mock v. Atlantic COAST Line Railroad, 87 S.E. 2d 830, 836 (S.C. 1955), or "the mental suffering resulting from emotions such as grief and despair." Martin v. United States, supra, at 876. In addition, the court is unable to determine from the record the true magnitude of the mental problems suffered by Edwin E. Rawl, III, after the death of his father and the extent to which same were causally related to that death. We, therefore, also

conclude that no damages are recoverable therefor because it is not established that nay mental problems suffered by the said beneficiary were proximately caused by the negligence of the Defendant.

R. Intangible factors of damage are recoverable "regardless of whether a statutory beneficiary was, at the time of the death, dependent upon the decedent for support." Elliott v. Black River Electric Cooperative, 104 S.E. 2d 357, 373 (S.C. 1958). Those intangible factors include "mental anguish and suffering by reason of the death," and "loss of companionship as a father," Brickman v. Southern Railway, 54 S.E. 553, 554 (S.C. 1906), as well as wounded feelings, grief, and sorrow, and "deprivation of the use and comfort of the decedent's society, including the loss of his

experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." Smith v. Wells, 188 S.E. 2d 470, 471 (S.C. 1972). "It is quite impossible to fix with anything approaching mathematical certainty the damages which one may suffer from the wrongful death of a father or husband, or to place a measure upon the grief which accompanies it." Norwood v. Atlantic Coast Line Railroad, et al., 27 S.E. 2d 803, 807 (S.C. 1943). See 19 S.C.L. Rev. 228 (1967). "Although their estimation may be enhanced by evidence of the closeness of the family and the affectionate or kindly disposition of the deceased, the existence of this kind of loss, in the absence of evidence to the contrary, is normally assumed by the jury." 19 S.C.L. Rev. at 228.

All three of Mr. Rawl's

children were over twenty-one years of age at the time of his death. Although some courts have held recovery for loss of nurture, guidance, and training to be cut off at that age, See Brooks, supra, at 636, this court prefers the view that "children rely on their fathers for nurture, guidance and training until at least twenty-five (25) years and in many instances throughout their parents' lives." Faust v. South Carolina State Highway Department, 527 F. Supp. 1021, 1034 n.1 (D.S.C. 1981). The Rawls were an unusually close family, with the sons, especially Julian W. Rawl, relying heavily on their father's business judgment and experience. Further, Mr. Rawl appeared to be especially benevolent in his material support of his daughter.

S. As a proximate result

of the negligence of the Defendant's agent, Airman Hennessey, the Plaintiff suffered damages, and is entitled to compensation therefor in the amount of $300,000.00 for mental anguish and suffering, wounded feelings, grief and sorrow, loss of companionship as a father, and deprivation of the use and comfort of the decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries.[20]

T. The Plaintiff, having

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[20]In arriving at this amount, the court has taken into consideration "the increased cost of living and the diminishing purchasing power of money, since damages that might be a fair compensation in value for a given wrong when money is dear and its purchasing power is great will not suffice when money is cheap and its purchasing power is small." Sanders v. Green, 208 F. Supp. 873, 878 (E.D.S.C. 1962). See Smoak v. Seaboard Coast Line Railroad, 193 S.E. 2d 594, 597 (S.C. 1972); Lucht, supra, at 858.

established the three elements of his case, negligence, proximate cause, and damages, by the greater weight or preponderance of the evidence, is entitled to have judgment against the Defendant in the amount of $300,000.00 actual damages.[21]

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[21] 28 U.S.C. Section 2674 provides that the Plaintiff shall not recover for interest prior to judgment or for punitive damages.

It is, therefore, ORDERED that the Plaintiff have judgment against the Defendant in the amount of $300,000.00, actual damages, and the costs of this action.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:

At Florence, South Carolina
October 12, 1984.

A TRUE COPY
Attest:
John W.Williams,
Clerk

BY /s/ E.J. Ravenel
Deputy Clerk

JUDGEMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

For The

DISTRICT OF SOUTH CAROLINA

Charleston Division

JULIAN W. RAWL, as Administrator of the Estate of EDWIN E. RAWL, JR.,	)	CIVIL ACTION DOCKET NO. 2:80-2525-2
Plaintiff,	)	
vs.	)	JUDGMENT
UNITED STATES OF AMERICA	)	
Defendant.	)	

This action came for trial (bearing) before the court, United States District Judge (Magistrate) C. Weston Houck presiding. The issues having been duly tried (beared) and a decision having been duly rendered, it is ordered and adjudged ..... that the Plaintiff Julian W. Rawl,

as Administrator of the Estate of Edwin E. Rawl, Jr., recover of the Defendant United States of America the sum of Three Hundred Thousand and 00/100 ($300,000.00) Dollars, with interest at the rate of 11.36%, and his costs of action.

Dated at Charleston, S.C.

Date: October 15, 1984
JOHN W. WILLLIAMS, CLERK

/s/ Judith M. Lucas
Deputy Clerk of the Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 84-2333

Julian W. Rawl, Administrator of the Estate of Edwin E. Rawl, Jr.,

Appellee,

versus

United States of America,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge.

Argued: September 10, 1985
Decided: December 4, 1985

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Gary W. Allen, Acting Director (Torts Branch, Civil Division; U.S. Department of Justice; Henry Dargan McMaster, United States Attorney; Richard K. Willard, Acting Assistant Attorney General on brief) for Appellant; Arnold S. Goodstein (Diane Schafer Goodstein on brief) for Appellee.

MURNAGHAN, Circuit Judge:

The United States Government appeals from a decision in the district court awarding damages in a wrongful death action. Edwin E. Rawl, Jr., and his wife Josie W. Rawl died in a small airplane crash out side of Grand Strand Airport at Myrtle Beach, South Carolina.[1] Plaintiffs, the Rawl's children, claimed damages under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) for the death of Edwin E. Rawl, Jr., arguing that the United States Air Force air traffic controllers and the Federal Aviation Administration were negligent in providing assistance to the decedent. Judge C. Weston Houck of the District of

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[1]The claim for the death of Mrs. Rawl have been settled previously and are not here involved.

South Carolina found that the government was negligent and that the negligence proximately caused Rawl's death. Judge Houck assumed for argument's sake that Rawl, the pilot of the airplane, also was negligent, but declined to bar the claims on grounds of contributory negligence because he deemed the government's negligence to be an intervening and superseding occurrence, relieving Rawl of responsibility for his own death. We do not disturb the lower court's finding as to negligence on the part of the government, but reverse the contributory negligence ruling, vacating the award of $300,000.

I. Background

The facts are far from simple. The incident occurred in airspace around the Grand Strand Airport near Myrtle Beach, South Carolina. Grand Strand functioned

principally for non-military aircraft. Because Grand Strand Airport had no radar of its own, the nearby Mrytle Beach Air Force base operated radar approach control ("RAPCON") for Grand Strand.

Rawl was an experienced pilot with over 2500 hours of flight time. He was certified to fly airplanes by visual flight rules ("VFR"), under which a pilot must be able to fly by sight, with a visibility of at least three miles. 14 C.F.R. Section 91.105 (1983). Rawl was not certified to fly by instrument flight rules ("IFR"), under which a pilot must be able to fly by instruments alone. 14 C.F.R. Section 91.115-.129 (1983).

On February 17, 1978, Rawl planned to fly his Beechcraft from Grand Strand Airport to

Greenville, North Carolina, pick up his wife there and return to Myrtle Beach in order to host an 8:00 p.m. dinner associated with his primary business activities. Prior to take-off from Grand Strand, Rawl contacted the Flight Service Station ("FSS") several times for a weather report: the report called for VFR conditions with hazy visibility and forecast the deterioration of those conditions in mid-evening. When Rawl departed Grand Strand at 5:45 p.m., conditions had already deteriorated to visibility of less than two miles with fog and haze present.[2] There was a broken layer of cloud at 500 feet and another layer of

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[2]Conditions had deteriorated so rapidly that, Rawl was offered--and accepted -- an IFR clearance in order to depart Grand Strand, a clearance in order to depart Grand Strand, a clearance he was not certified to accept.

clouds at 3000 feet.

Rawl arrived at the Greenville airport and picked up his wife, departing again by 7:00 p.m. The sun had set. The sky was dark.

At 7:19:40 p.m. Rawl made contact with RAPCON at Myrtle Beach. Weather conditions were a ceiling of 400 feet overcast with visibility of two miles and fog and haze. At 7:20:52 p.m. Rawl told RAPCON that he was flying VFR. The RAPCON operator responded that he could not let Rawl come in under VFR, and suggested Rawl come in under Special VFR.[3] Rawl

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[3]Under Special VFR, visibility must be at least one statute mile and the special minimums applicable under the regulation are inapplicable between sunset and sunrise. Generally speaking, Special VFR allows a pilot to flying controlled airspace so long as the pilot avoids clouds and has at least one mile visibility. 14 C.F.R. Section 91.107 (1985).

concurred.[4]

As Rawl approached the airport, he was told to expect a ten minute delay while another plane, a Cessna, was brought in under Special VFR. While Rawl listened on the same frequency, RAPCON attempted to bring the Cessna into the airport. The Cessna made several passes over the airport and was unable to locate it. An emergency situation was declared for the Cessna at 7:45:05; eventually the Cessna landed safely but came to rest in the grass at the end of the runway.

At around 8:00 p.m., Rawl was cleared to approach the airport. RAPCON instructed Rawl to maintain Special VFR at or below

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[4]A pilot must have instrument flight rating, which Rawl did not have, to accept Special VFR clearance after sunset. 14 C.F.R. Section 91.107 (e) (1985).

1500 feet. While Rawl flew toward Grand Strand, RAPCON suggested that another plane divert to Wilmington, North Carolina, where the weather was significantly less opaque. A similar suggestion was not made to Rawl nor, the district court found, did Rawl hear the suggestion made to the other flight; Rawl was on a different radio frequency. Rawl v. United States, Civ. Act. No. 2:80-2525-2, slip op. at 7 (D.S.C. Oct. 12, 1984).

At 8:04 p.m., Rawl informed RAPCON that he had four hours of fuel left, and that, at his then-current altitude of 2500 feet, he would be unable to see the airport as he approached. At the time, Rawl was flying between two layers of cloud at 1000 feet and 3000 feet, and in darkness. The presence of the Atlantic Ocean to the east and an unpopulated section

of country to the west further limited Rawl's ability to orient his aircraft by visual reference points. Rawl requested vectors for the airport so that he could "slip right down under" the weather and land. RAPCON instructed him to descent to 1600 feet.

The key series of instructions began at 8:05:17 p.m. Rawl was flying on a heading of 45° and was told to turn left 135° to a heading of 270°. At 8:06:36, RAPCON asked Rawl to state his heading, whereupon a miscommunication occurred. Rawl stated that his heading was 300°, but a portion of the transmission was inaudible; RAPCON did not ask for a clarification and instead upon that false assumption, told Rawl to turn right to 120·"

A few moments later, a supervisor at RAPCON pointed out

the possibility of a miscommunication to the air controller on duty, and the latter asked Rawl for a clarification. Rawl advised that his response had been 300° and that his heading at the time of clarification was 330°. RAPCON told Rawl to turn left to 220°. Shortly after the instruction, the plane crashed, killing Rawl and his wife.

Experts at trial agreed that "spatial disorientation"[5] caused Rawl to go into a power dive and crash. Understandably, there was great dispute as to the

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[5]Spatial disorientation is a condition caused by conflicts between a pilot's visual references and inner sense of orientation in space. A pilot who is deprived of visual reference points, and who has not been certified to fly on instruments alone, may become enveloped in false sensations and will not know, quite literally, which way is up. The confusion often results in loss of control of the airplane.

proximate cause of Rawl's spatial disorientation.

The district court found that the negligence of the air traffic controller at RAPCON caused the spatial disorientation and the accident, and rejected the government's defense of contributory negligence on the part of Rawl. The district court relied on two theories of government negligence. Under the first theory, RAPCON failed to follow standards of due care in directing Rawl back toward the airport: the result was spatial disorientation. According to the district court, the RAPCON controller violated section 1592 of the Air Traffic control Manual ("the Manual") by directing Rawl to make a series of

"abrupt maneuvers."[6] Abrupt maneuvers with no visual cues outside the aircraft can cause

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[6]Section 1592 of the Manual outlines procedures designed to help controller assist pilots not qualified to operate in IFR conditions.

1592. Radar Assistance Techniques

Use the following techniques to the extent possible when you provide radar assistance to a pilot not qualified to operate in IFR conditions.

a. Avoid radio frequency changes except when necessary to provide a clear communications channel.

b. Make turns while the aircraft is in VFR conditions so it will be in a position to fly a straight course in IFR conditions.

c. Have pilot lower gear and slow aircraft to approach speed while in VFR conditions.

d. Avoid requiring a climb or descent while in a turn if in IFR conditions.

e. Avoid abrupt maneuvers.

f. Vector aircraft to VFR conditions. (Emphasis added).

spatial disorientation. The district court also found RAPCON negligent in relying on Rawl's "obviously incomplete" heading report of "30 degrees." The district court concluded that "reasonable prudence and care" required RAPCON to ask for a clarification before issuing the initial vector change; the result of the initial vector followed by the heading given just after the clarification was a hard right turn followed by a hard left turn within less than one minute. Both acts of negligence, the court found, caused the spatial disorientation and the crash.

The second theory of negligence faults RAPCON for failing to suggest alternative airports where VFR conditions prevailed. The district court found that the RAPCON controller's

omission violated section 1591 of the Manual.[7] The court reasoned that the omission was a proximate cause of the crash because "it is reasonable to assume that Mr. RAwl might have chosen to land elsewhere, thus avoiding the subsequent crash" because another pilot diverted to another airport

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[7]Section 1591. Radar Assistance to VFR Aircraft in Weather Difficulty.

a. If a VFR aircraft requests radar assistance when it encounters or is about to encounter IFR weather conditions, ask the pilot if he is qualified for and capable of conducting IFR flight.

....

c. If the pilot states he is not qualified for or not capable of conducting IFR flight . . . take whichever of the following actions is appropriate:

(1) Inform the pilot of airports where VFR conditions are reported, provide other available pertinent weather information, and ask if he will elect to conduct VFR flight to such an airport.

....

at the suggestion of RAPCON. We have, in light of our determination on the subject of contributory negligence, no occasion to inquire into the validity of the findings that the government was negligent and that the negligence amounted to proximate cause, and proceed on the assumption that they were not clearly erroneous.

The district court rejected the government's defense of contributory negligence on the part of Rawl. It described the negligent acts and omissions of RAPCON as the "intervening" or "superseding" cause of the accident.[8] Thus, under the court's

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[8]The District Judge concluded:

> Obviously, had Rawl not been flying that night, his crash would not have occurred. But, once he came with the ambit and authority of the RAPCON, those controllers had a duty to use reasonable care to bring him in safely, which duty and resulting breach thereof were

view, the negligence of RAPCON was the sole cause of the accident, and Rawl's negligence did not contribute. Hence, it was claimed, it did not nullify the negligence of the government.

II. Discussion

We do not address the issue of whether the goverment was negligent at any length, given that the record on appeal shows substantial evidence to support the district court's findings in that regard. Accepting the district judge's determination as to negligence on the apart of the government, we turn to the legal standard applied in determining a lack of relevant contributory

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not reasonably foreseeable, and, thus, intervened to preclude the causal connection to any negligence by Rawl.

Slip op. at 40-41.

negligence on the part of Rawl. Because we find that the district court's application of the doctrine of "intervening and superseding cause" to the facts adduced at trial was wrong as a matter of law, we vacate the judgment below, and direct entry of a judgment in the government's favor.

Of course, we are aware of the limits placed upon us as an appellate court reviewing a trial court decision. We may not overturn findings of fact unless they are "clearly erroneous." Fed. R. Civ. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witness."; Pullman-Standard v. Swint, 456 U.S. 273 (1982). The clearly erroneous rule applies even when the trial court's

findings are based upon physical or documentary evidence, or inferences from the facts. Anderson v. City of Bessemer City, _____ U.S. _____, 105 S. Ct. 1504 (1985). In the case Sub judice, however, we find a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts. Characterized in either fashion, the situation permits us to correct the error in the district court.[9]

The common law doctrine

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[9]Though some courts have taken the view that the clearly erroneous standard applies to mixed questions of law and fact, Manning v. Trustees of Tafts College, 613 F. 2d 1200 (1st Cir. 1980); United States v. McConney, 728 F. 2d 1195 (9th Cir. 1984), cert. denied, 105 S. Ct. 101 (1984), a greater number have held that an appellate court may exercise independent review. Karavos Compania Naviera, S.A. v. Atlantic Export Corp., 588 F. 2d 1 (2nd Cir. 1978); First National Bank v. Pepper, 547 F. 2d 708 (2d Cir. 1976); William B. Tanner Co. v. WIOO, Inc., 528 F. 2d 262 (3rd Cir. 1975); Stafos v. Jarvis, 477 F. 2d 369 (10th Cir. 1973), cert. denied, 414 U.S. 944 (1973).

of contributory negligence has deep roots in South Carolina law. The rule has been described as:

> a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.

Easler v. Railway co., 59 S.C. 311, 322, 37 S.E. 938, 941 (1901); accord Horne v. Atlantic Coast Line R. Co., 177 S.C. 461, 469, 181 S.E. 642, 646 (1935). Generally, under South Carolina law, a finding of contributory negligence on the part of the Plaintiff bars recovery of damages from the Defendant. See 57 Am. Jur. 2d Section 288 ("(T)here can be no recovery of damages for negligence if the injured person, by his own negligence, or by the negligence of another legally

imputable to him, proximately contributed to the injury."); Horne, 177 S.C. at 471, 181 S.E. at 647.

The government argued at trial that Rawl was contributorily negligent in two respects: First, Rawl persisted in his plan of landing at Grand Strand Airport despite deteriorating weather conditions (about which he knew or should have known) and despite difficulties of other pilots, at least one of which Rawl knew about; second, Rawl could have avoided spatial disorientation had he maintained proper instrument skills. Without passing on these assertions for the moment, it is at least true that Rawl flew in circumstances that a reasonable pilot with similar qualifications, or, perhaps, more accurately, with similar lack of qualifications,

would have shunned. He flew from Grand Strand under deteriorating conditions and after accepting an IFR flight clearance for which he was not qualified. When he departed Greenville on the return flight, he knew or should have known that conditions precluded VFR landing at Grand Strand. He insisted upon landing at Grand Strand despite the conditions there, the difficulties experienced by the Cessna in landing,[10] and his own lack of instrument flight training. The district court at least recognized that "had Mr. Rawl not been flying that night, his

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[10]The district court's findings of fact indicate a brief that Rawl was unaware of the Cessna's problems in locating the airport, and in landing. However, Rawl was on the same frequency as that of the Cessna, and after the Cessna had landed, Rawl queried RAPCON as to the altitude at which the Cessna had broken through the cloud cover in descending to the runway.

crash would not have occurred.

The district court, however, disposed of the issue by assuming arguendo that Rawl was negligent in flying when he did, but deciding that the negligence of RAPCON constituted an intervening and superseding cause of the accident and so Rawl's negligence was not contributory.

From the facts, we conclude that, as a matter of law, Rawl was not only negligent, but contributorily negligent s well. Furthermore, we are satisfied that the doctrine of "intervening" and "superseding" negligence is inapplicable here. Superseding negligence is customarily a defendant's defense to the unforeseeable conduct of a third party or to unforeseeable intervening forces. For instance, in Hensley v. Heavrin, 277 S.C. 86,

282 S.E. 2d 854 (1981), a woman suffered injury to her marriage and her emotions when a doctor erroneously found that she had become infected with syphilis. Among the damages, plaintiff attempted to recover from the doctor for injuries caused when her husband committed a battery against her. Based on the erroneous diagnosis, the husband had suspected that plaintiff had been unfaithful. The Supreme Court of South Carolina held that the doctor could not be held accountable for the injury from the battery because the husband's reaction was an unforeseeable intervening cause of the injury. Id. at 87-88, 282 S.E. 2d at 855. In Matthews v. Porter, 239 S.C. 620, 124 S.E. 2d 321 (1962), the Supreme court of South Carolina wrote:

> Evidence of an independent negligent act of a third party is directed to the question of proximate cause. To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury. (Citation).

239 S.C. at 628, 124 S.E. 2d at 325. The doctrine of intervening and superseding negligence traditionally has not been asserted by a plaintiff against a contributory negligence claim by a defendant. It is usually a rule allowing a defendant to avoid liability where damages have been caused by a third party or a force that was entirely unforeseeable, so much so that it could hardly be said that the injury was the result

of the defendant's negligence[11]

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[11] See Prosser & Keeton on Torts Section 44 (1984) ("The question is always one of whether the defendant is to be relieved of responsibility, and the defendant's liability superseded, by the subsequent event.")

The problem of whether the superseding and intervening negligence theory is available only for the benefit of defendants may, however, be simply no more than a matter of labels, for the doctrine of intervening and superseding negligence is very similar to a rule of law which allows a plaintiff to avoid the consequences of contributory negligence by showing that his own negligence did not proximately cause the injury he suffered. Thus, contributory negligence will not bar recovery where the plaintiff can show that his own conduct did not expose him to a foreseeable risk of the particular injury that in fact occurred through the negligence of the defendant. See Restatement of torts Section 468 (1965) ("The fact that the plaintiff has failed to exercise reasonable for his own safety does not bar his recovery unless his harm results from one of the hazards which make his conduct negligent."). The doctrine has been characterized in terms of lack of proximate cause: if the harm that occurred wa not a foreseeable hazard of plaintiff's negligence, the plaintiff may recover from defendant. The proximate cause of the injury was the defendant's intervening negligence, and the

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causal connection between the plaintiff's negligence and the injury was broken. See Fahringer v. Rinehimer, 283 Pa. Super. 93, 97-98, 423 A.2d 731, 734 (1980) ('(R)egardless of whether or not appellee was negligent, he is not . . . barred from recovery, for his injury did not result from one of the hazards he was under a duty to foresee.")

Hence, even assuming that the district court in Rawl intended to apply the rule, of which Fahringer is an example, we cannot state, on the basis of the trial record, that Rawl has met the requirements to avoid the bar of contributory negligence. The hazard, spatial disorientation, was a foreseeable result of flying at night, in conditions of poor visibility, and without IFR training. The consequence, loss of control of the plane and death was a foreseeable result. Even the cause, the negligence of RAPCON, was a foreseeable event. Thus, however the legal theory employed by the district court is denominated is of little consequence since the result is the same under either.

See Restatement of Torts 2d Section 440 ("A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about").

In any event, even accepting that the doctrine denominated intervening and superseding negligence may operate to immunize a plaintiff from a claim of contributory negligence, nevertheless, in the instant case, the government's negligence was not intervening or superseding. The negligence of RAPCON simply did not qualify as an entirely unforeseeable and unexpected force breading the causal connection. The district judge did not discuss at length the elements of an

intervening and superseding cause, and found simply that the negligence of RAPCON broke the causal connection with Rawl's negligence. Several considerations have traditionally been analyzed in deciding whether an intervening cause should be called superseding. For instance, courts have examined whether the harm caused was different in kind from that which would have followed from the Defendant's negligence. See Johnson v. Kosmos Portland Cement Co., 64 F. 2d 193 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933). Whether the operation or the consequences of the intervening cause "appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation" has been considered important as well. Restatement of Torts Section 442

(b) (1965). In addition, whether the intervening force acts independently of the situation or is a normal part of the situation must be considered, and whether the intervening cause is a third party's action or omission. See Ruland Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 275, 56 S.E. 2d 689, 694 (1949).

Under the aforementioned considerations, the district court's conclusion that RAPCON's negligence was an intervening and superseding cause is not supportable. Certainly the injury (spatial disorientation resulting in a crash and the loss of life) is one of several types of harm that would normally flow from Rawl's negligence. Furthermore, error on the part of RAPCON, though it reflected a failure to observe a duty of care, was not so strange

and extraordinary an occurrence as to be unforeseeable. Finally, RAPCON's negligence was not a force independent of the situation and it was certainly not an action by a third party.

The district court incorrectly applied the doctrine of intervening and superseding cause. The doctrine was intended to relieve a party of responsibility for injuries which he could not have foreseen and ultimately did not cause -- injuries arising from a force or actor wholly outside of the circumstances of the original negligence.

Rawl's negligence and RAPCON's negligence were substantial, concurring causes of the crash. See Odom v. Steigerwald, 260 S.C. 422, 196 S.E. 2d 635 (1973); Smith v. Blackwell, 250 S.C. 183, 156 S.E. 2d 871

(1967); ("In order to be contributory, the negligence of an injured person must combine and concur with the negligence of another as a proximate cause of the injury."); Seay v. Southern Ry., 205 S.C. 162,174, 31 S.E. 2d 133, 138 (1944). Our conclusion does not represent a redetermination of a finding of fact made by the district court; it is the application of a different, and correct, legal standard to the facts as developed in the record.

The record on appeal and the findings of fact by the district court show clearly that Rawl was negligent in attempting to land his aircraft at the Grand Strand airport at Myrtle Beach under the circumstances. Rawl had ultimate responsibility for his aircraft, and had a duty to exercise care to avoid unreasonable

hazards. Mattschei v. United States, 600 F. 2d 205, 208 (9th Cir. 1979) (obligation to exercise due care is "a concurrent one resting on both the control tower personnel and the pilot."). Rawl violated that duty of care by flying back to Grand Strand after dark, in weather conditions that he knew or should have known would bar a VFR landing. Upon approaching Grand Strand airport, he had readily to perceive that landing would not be possible in VFR conditions. Rawl lacked instrument flight qualification. He knew that at least one other plane with Special VFR clearance landed only with great difficulty. Despite the foregoing, Rawl insisted upon landing at Grand Strand in order to avoid missing a business dinner party in Myrtle Beach for which he was the host.

Finally, Rawl accepted IFR clearance upon departure from Grand Strand, a clearance he was not qualified to accept, and accepted Special VFR clearance to land at Grand Strand, despite the fact that pilots with only VFR qualification may not accept Special VFR clearance after sunset. We conclude that Rawl's negligence was a concurrent proximate cause of the crash, and under the doctrine of contributory negligence, operated to bar recovery from the government.[12]

REVERSED.

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[12]Numerous cases, on varied facts, have held that a pilot's carelessness constituted contributory negligence. See e.g., Kullberg v. United States, 271 F. Supp. 788 (W.D. Pa. 1964); Somlo v. United States, 416 F. 2d 640 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970); Michelmore v. United States, 299 F. Supp. 1116 (C.D. Cal. 1969), aff'd sub nom., Spaulding v. United States, 445 F. 2d 222 (9th Cir. 1972).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2333

Julian W. Rawl, Administrator of the Estate of Edwin E. Rawl, Jr.,

Appellee,

versus

United States of America,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Phillips and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1742

In the Supreme Court of the United States

OCTOBER TERM, 1986

JULIAN W. RAWL, ADMINISTRATOR OF THE ESTATE OF EDWIN E. RAWL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court erred in its application of the superseding cause doctrine.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 76-108) is reported at 778 F.2d 1009. The opinion of the district court (Pet. App. 2-73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1985. A petition for rehearing was denied on January 21, 1986 (Pet. App. 109-110). The petition for a writ of certiorari was filed on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, arises from the crash of a single-engine aircraft approximately six miles northeast of the Grand Strand Airport in North Myrtle Beach, South Carolina. The pilot, Edwin E. Rawl, Jr., left the airport at 5:45 p.m. on February 17, 1978, to fly to Greenville, North Carolina, to pick up his wife. He planned to return to Myrtle Beach by eight o'clock in order to host a business dinner. Rawl was experienced in flying under visual flight rules (VFR), under which a pilot must be able to fly by sight with a visibility of at least three miles. He was not, however, certified to fly by instrument flight rules (IFR), under which a pilot must be able to fly solely by instruments. Before taking off from North Myrtle Beach, Rawl learned that the weather report indicated VFR conditions with hazy visibility, but forecast that these conditions would deteriorate later in the evening. At the time of Rawl's take-off, conditions had already deteriorated to visibility of less than two miles with haze and fog. Since conditions had deteriorated below the requirements for a VFR clearance, Rawl was offered and accepted an IFR clearance to take off, although he was not qualified to accept that clearance. Pet. App. 79-80.

Rawl arrived at Greenville, picked up his wife, and departed again without checking the weather report. At 7:19 p.m. Rawl first made contact with the air traffic controller at the Grand Strand Airport. Rawl told the controller that he was flying VFR. The controller told Rawl that he could not land at the airport under VFR but agreed to let Rawl make his approach under "special VFR," even though a pilot must have an IFR rating to accept a special VFR clearance after

sunset. After a delay of more than half an hour while another small plane landed,[1] Rawl was cleared to approach the airport.[2] Pet. App. 80-82.

During the delay, Rawl had been flying between two layers of clouds at 1,000 and 3,000 feet and in darkness. Rawl asked for vectors to bring him down to a landing. At 8:05 p.m., while Rawl was flying on a heading of 45 degrees, the air traffic controller told him to turn left 135 degrees to a heading of 270 degress. Rawl was asked to state his heading about a minute and a half later. He replied that he was at 300 degrees, but the controller misunderstood and assumed he said 30 degrees.[3] Based on that assumption, the controller told Rawl to turn right to 120 degrees. A few moments later, a supervisor told the controller that he thought there had been a miscommunication. The controller asked Rawl to state his heading again and Rawl responded that his earlier heading had been

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[1] At 7:28 p.m. and again at 7:42 p.m., Rawl was told to expect a ten-minute delay while another plane, a Cessna, was brought in under special VFR. The Cessna pilot made several passes over the airport but was unable to see it. At 7:45 p.m. an emergency situation was declared for the Cessna. About five minutes later, after radio contact had been lost for a short while, the Cessna landed safely but came to rest in the grass at the end of the runway. Pet. App. 82.

[2] At about the same time, an air traffic controller suggested that another small plane divert to Wilmington, North Carolina, where the weather was significantly better. A similar suggestion was not made to Rawl. Nor did Rawl, who was on a different radio frequency, hear this suggestion. Pet. App. 83.

[3] Three numbers are provided when stating headings, so that a 300 degree heading is stated "three-zero-zero," while a 30 degree heading is stated "zero-three-zero." Because a portion of Rawl's transmission was inaudible, the air traffic controller heard only "three-zero." Pet. App. 84.

300 degrees and that he was now at 330 degrees. The controller told Rawl to turn left to 220 degrees. Shortly after this, the plane crashed, killing both Rawl and his wife. Pet. App. 83-85.

2. The district court found that Rawl went into a power dive and crashed because of "spatial disorientation." [4] The district court held that the air traffic controller negligently directed Rawl to make a series of abrupt turns after failing to ask for a clarification of his obviously incomplete heading report (Pet. App. 36-37). The district court also held that the controller negligently failed to suggest alternative airports where VFR conditions prevailed (*id.* at 43). The district court then considered the government's contention that Rawl had been contributorily negligent in attempting to land at North Myrtle Beach because a reasonably prudent pilot who did not have an IFR rating would have sought another landing site.[5] The court "[a]ssum[ed] *arguendo*" (Pet. App. 51) that Rawl was negligent, but concluded that the air traffic controller's negligent acts "were each intervening and superseding causes which relieved Mr. Rawl of any contributory negligence" (*id.* at 56).

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[4] As the court of appeals explained (Pet. App. 85 n.5):

> Spatial disorientation is a condition caused by conflicts between a pilot's visual references and inner sense of orientation in space. A pilot who is deprived of visual reference points, and who has not been certified to fly on instruments alone, may become enveloped in false sensations and will not know, quite literally, which way is up. The confusion often results in loss of control of the airplane.

[5] Under applicable South Carolina law, contributory negligence on the part of a plaintiff bars recovery.

3. The court of appeals reversed (Pet. App. 76-108). It did not question the district court's finding that the air traffic controller acted negligently (*id.* at 90). It also concluded that Rawl had been negligent, since he "flew in circumstances that a reasonable pilot with similar qualifications, or, perhaps, more accurately, with similar lack of qualifications, would have shunned" (*id.* at 95-96). The court noted that Rawl accepted IFR clearance to depart from the Grand Strand Airport although he was not qualified for it and then returned to the airport after dark in weather conditions that "he knew or should have known [would bar a] VFR landing" (*ibid.*). Under these circumstances, the court of appeals held that "the district court's application of the doctrine of 'intervening and superseding cause' to the facts adduced at trial was wrong as a matter of law" (*id.* at 92). The court noted that that doctrine is applicable when an extraordinary event, usually different in kind and independent of the negligent act that is superseded, intervenes between a negligent act and an injury (*id.* at 103-104). In this case, the court explained, the air traffic controller's negligence "did not qualify as an entirely unforeseeable and unexpected force brea[k]ing the causal connection" (*id.* at 102). Rather, the court held that the controller's and Rawl's negligence were "substantial, concurring causes of the crash" (*id.* at 105).

ARGUMENT

The court of appeals correctly decided that the district court erred in its application of the superseding cause doctrine under the facts of this case. Contrary to petitioner's claim, this case presents no issue on which the circuits disagree. Accordingly, there is no warrant for review by this Court.

1. Petitioner's principal contention (Pet. 26-42) is that the court of appeals improperly reversed findings of fact made by the district court without concluding that they were clearly erroneous, as required by Fed. R. Civ. P. 52(a). Petitioner's contention is in error. As the court of appeals stated (Pet. App. 92-93), the holding it reversed was a question of law rather than a question of fact, so the clearly erroneous standard did not apply.

The court of appeals accepted the district court's finding of negligence by the air traffic controller. Since the district court did not make a final determination as to whether or not Rawl was negligent, instead assuming arguendo that he was negligent in pursuing his plans to land at the Grand Strand Airport despite the weather (Pet. App. 51), the court of appeals' conclusion that Rawl was negligent did not conflict with the district court's findings of fact concerning Rawl's negligence.[6] The difference in result

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[6] The only conflict with the findings of fact was the court of appeals' statement (Pet. App. 96) that Rawl knew that another plane with a special VFR clearance had landed only with great difficulty, but nevertheless he insisted on trying to land. See Pet. App. 82. The court of appeals thus contradicted the district court's belief that Rawl was unaware of the difficulties the Cessna encountered, and made its own finding that Rawl knew of the Cessna's problems. Petitioner suggests that the court of appeals erred in not finding clearly erroneous the

is the consequence of the court of appeals' holding on superseding cause, and not the consequence of any disagreement on a question of fact.

The court of appeals, and not the district court, correctly applied the superseding cause doctrine. The harm caused by a superseding cause is usually different in kind from that which would have resulted from the prior negligence. See *Johnson* v. *Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir.), cert. denied, 290 U.S. 641 (1933). A superseding cause is also usually extraordinary, rather than normal, in either its operation or its consequences. Restatement (Second) of Torts § 442(b) (1965). And, as the court of appeals noted (Pet. App. 104), a superseding cause is usually independent of the situation in which the prior negligence occurred. Thus, the essence of the theory of superseding cause is that the act which is claimed to be a superseding cause is an unforeseeable and unexpected force breaking the causal connection between the claimed negligence and the injury.

The air traffic controller's actions were not a superseding cause of the crash under these criteria.

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district court's conclusion that Rawl was not aware of the Cessna's probelms in locating the airport. Though the court of appeals did not explicitly state that the district court's belief was clearly erroneous, it did implicitly so hold when it stated that Rawl knew of the other plane's problems, while noting that "[t]he district court's findings of fact indicate a belief that Rawl was unaware of the Cessna's problems in locating the airport, and in landing" (Pet. App. 96 n.10). Moreover, the district court did clearly err because the record, as cited by the district court, showed that "Rawl was on the same frequency as that of the Cessna, and after the Cessna had landed, Rawl queried [the air traffic controller] as to the altitude at which the Cessna had broken through the cloud cover in descending to the runway" (*ibid.*).

Every negligent act of the air traffic controller was coupled with a similar negligent act by Rawl. Both knew or should have known that Rawl should not have left North Myrtle Beach while the weather was deteriorating or tried to land there after sunset in poor conditions. While the controller knew that conditions were better at the Wilmington, North Carolina, airport, Rawl knew that he had four hours of fuel left (Pet. App. 15), so he must have known that it would be possible to land in better conditions elsewhere. And the district court found that both the controller and Rawl knew or should have known that making a series of abrupt turns between two cloud layers could induce spatial disorientation (*id.* at 24-25). In short, the air traffic controller's negligence was in no sense different in kind or independent of Rawl's negligence. If either had adhered to the rules or taken precautions to avoid spatial disorientation the crash would not have occurred. But neither did and, as the court of appeals concluded (*id.* at 105), their negligence concurrently caused the crash.[7]

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[7] While stating that the district court was "wrong as a matter of law" (Pet. App. 92), the court of appeals also stated that it found "a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts" (*id.* at 93). The court also noted (*id.* at 93 n.9) that the courts of appeals have differed somewhat in their approach to reviewing mixed questions of law and fact, as this Court has also noted (*Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 n.19 (1982)). This case does not present an opportunity to resolve the disagreement concerning the proper standard of review of mixed questions of law and fact. Petitioner has not argued that review by this Court is warranted because of any disagreement in the circuits concerning review of mixed questions of law and fact.

2. Petitioner also contends (Pet. 42-63) that the decision of the court of appeals conflicts with decisions in other circuits. Specifically, petitioner claims that there is "a lack of uniformity among the circuits and within the Fourth Circuit on the scope of review by an appellate court of a trial court's findings of negligence" (Pet. 42). Petitioner's argument totally misses the mark. As we have shown, the court of appeals did not disagree with the district court's conclusions regarding negligence, either on the part of the air traffic controller or on the part of Rawl. Instead, the court reversed because the findings of fact simply did not allow the legal conclusion that the controller's negligence was a superseding cause of the crash. Thus, petitioner's assertions about the standard of review for findings of negligence are irrelevant.

(Petitioner did not cite *Pullman-Standard* or any of the cases cited by the court of appeals (Pet. App. 93 n.9).) In addition, the error of the district court is best considered an error of law, so that this case does not present a mixed question of law and fact. This Court has defined mixed questions of law and fact as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard" (*Pullman-Standard*, 456 U.S. at 289 n.19). In this case the rule of law is not undisputed because, as the court of appeals concluded, the district court misunderstood the superseding cause doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

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